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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 720

LEROY G. CHARLES, JOHN L. CHARLES, MARY E. CHARLES, WOODROW CHARLES, DOCK CHARLES, EUGENE CHARLES AND GRADY JONES,

Petitioners,

VS.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

LEROY G. CHARLES
JOHN L. CHARLES
MARY E. CHARLES
WOODROW CHARLES
DOCK CHARLES and
GRADY JONES,
Petitioners.

LEROY G. CHARLES,
Attorney for Petitioners.

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protection of the law and imposes upon Petitioners and live poultry dealers in Chicago unreasonable, unconscionable and oppressive physical and financial burdens of unnecessary building construction and installation of an elaborate system of keeping books and records and virtually excludes petitioners and other retail live poultry dealers from business in Chicago in violation of the Fifth and 14th Amendments to the Constitution of the United States 33

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LEROY G. CHARLES, JOHN L. CHARLES, MARY E. CHARLES, WOODROW CHARLES, DOCK CHARLES, EUGENE CHARLES AND GRADY JONES,

Petitioners,

VS.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To The Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioners, LeRoy G. Charles, John L. Charles, Mary E. Charles, Woodrow Charles, Dock Charles, Eugene Charles and Grady Jones, Plaintiffs-Appellants in the Court below, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered on the 20th day of November 1952 (R. 41-48).

A petition for rehearing was duly filed within the time allowed by the rules of the Supreme Court of Illinois, and was considered and denied by said Court on the 19th day of January 1953. This petition for certiorari, together with the certified transcript of record are filed in this Court within three months after the denial of the petition for rehearing by the Supreme Court of Illinois.

I.

Summary and Statement of the Matters Involved.

This is a suit in chancery, brought by the petitioners to enjoin and restrain the enforcement of certain amendments to an ordinance of the City of Chicago regulating the licensing and operation of retail live poultry dealers in Chicago, on the ground that the amendments are unreasonable and arbitrary class legislation exempting retail dressed poultry dealers and wholesale live poultry dealers in the City of Chicago from the confiscatory burdens and prohibitions that it imposed upon retail live poultry dealers in the City of Chicago, in violation of the due process clause of the constitution of the State of Illinois and the Fifth and Fourteenth Amendments to the Constitution of the United States.

The cause was decided upon the amended complaint and the defendant's motion to strike the amended complaint and dismiss the suit, which motion was sustained by the trial court, except as to Section 95-29.8, which the court held unconstitutional (R. 27).

A Certificate of Importance was issued by the trial court certifying to the Supreme Court of Illinois that

the validity of a municipal ordinance was involved, which required speedy settlement of the constitutional questions involved by a decision of the Supreme Court of Illinois, and a direct appeal was taken to the Supreme Court of Illinois (R. 28-29).

On May 22, 1952, the Supreme Court of Illinois reversed the trial court, except as to Section 95-29.8, which was not appealed from by either party, and held the amendments void (R. 32-37).

The City filed a petition for rehearing on June 12, 1952, and Kosher Butchers Association-Inc. were permitted to intervene as *amicus curiae* on June 13, 1952, and file briefs in 20 days. Rehearing was allowed on September 15, 1952. (R. 40-41). The Supreme Court of Illinois reversed itself on November 20, 1952, and held the ordinance valid, and reversed that part of the decree, which was not appealed from by either party, which held Section 95-29.8 of the ordinance void. In its second opinion, the Supreme Court of Illinois held the amendments to said ordinance to be reasonable and valid regulations under both the state and federal constitutions (R. 41-48).

All the facts in the case are unequivocally set forth in the amended complaint (R. 1-17). The nature and effect of the obnoxious amendments are apparent on their face. Plaintiffs' Exhibit 1, is attached to their amended complaint (R. 17-23). The facts positively stated in the amended complaint are unqualifiedly admitted by the defendant, in its motion to strike the amended complaint and dismiss the suit, which motion has now been sustained in toto by the second opinion of the Supreme Court of Illinois.

The Amended Complaint.

The amended complaint alleged that the plaintiffs are engaged in the live poultry business in the City of Chicago, under the style and name of Farm House Poultry Markets; that beginning in 1935, they established, owned and operated seven of such stores by January 1, 1948, and that each store contains steel batteries, with removable drop pans, which collect the waste; that the chickens are taken from delivering trucks and placed and kept in these steel batteries until they are slaughtered and sold; that in the rear of each of the stores are steel and metal bleeders, each one of which contains six cone-shaped troughs 10 inches in diameter at the top and 4 inches in diameter at the bottom; that the tops and bottoms of the bleeders are open; that the slaughtered chickens are placed in the bleeders with their heads down; that the blood is caught in movable pans; that the dead chickens are then placed in water of about 190 degrees Fahrenheit and then into electric picking machines and the feathers removed, after which the chickens are eviscerated; that the refuse is placed in metal containers with tight fitting covers; that the refuse is carted away three times per week by private scavengers hired by plaintiffs; that all equipment, including batteries, bleeders, pans, floors, walls and ceilings are thoroughly cleaned daily; that all crates are thoroughly cleaned and stored in the rear yards of each store and are removed three times each week by the wholesalers; that each store is kept and maintained in a clean and sanitary condition and in

compliance with all the rules and provisions of the Board of Health of the City of Chicago, and in compliance with the ordinances of the City of Chicago and the laws of the State of Illinois and the United States (R. 1-3).

Applicable parts of the ordinance regulating the conduct of the poultry business in all of its phases in the City of Chicago prior to the obnoxious amendments of December 1, 1950, are set forth, which ordinance provides for adequate ventilation, and that such places be kept free from rats, mice, flies and other insects and vermin (R. 3); that they shall be kept free from litter and rubbish; that adequate lockers and dressing rooms shall be provided outside of the kitchen or other food processing rooms; that soiled linens, coats and aprons shall be kept in containers provided for that purpose; that a license shall be issued to an applicant only upon giving the Board of Health full information as to the size and nature of the place of business; the purpose of the business, the condition, equipment and facilities for conducting the business therein, the health of the persons employed and to be employed and the regulations and facilities provided for them. The existing ordinance further provides that before any license shall issue, the Board of Health shall cause an inspection to be made of the premises to be occupied by the applicant, the equipment contained therein, the employees intended for the same and other matters relating to the business (R. 4).

The amended complaint further alleged that the rear of each of their stores contain cement floors and sanitary toilets; that the floors and toilets are kept and have al-

ways been kept in a clean and sanitary condition; that the plaintiffs have always conducted their businesses under licenses issued to them by said City of Chicago; that the Board of Health of the City of Chicago has always inspected their stores and the premises in which they are conducted and has always approved the sanitary conditions therein; that the plaintiff's stores are located in business districts and are surrounded by business property occupied by various businesses; that the plaintiffs applied for their licenses and tendered therewith the required fees. but were refused licenses on the sole ground of their noncompliance with the amendments under attack; that the plaintiffs are obligated on leases on said stores, ranging from one year to five years at rentals of from $100.00 per month to $250.00 per month; that before leasing said stores, they requested inspections of said stores by the Building and Health commissioners of the City of Chicago, and were informed by these officials that said buildings were suitable for the purposes for which they are being used (R. 4-5).

The amended complaint further alleged that the manner in which their businesses are conducted is in no way injurious to the public health, safety or morals; that their lessors will not permit their buildings to be remodeled as required by the amendments in question; that it would cost at least $5000.00 to remodel each store to comply with the amendments; that according to the 1948 statistics of the United States Department of Agriculture, wholesale live poultry dealers in Chicago slaughtered and sold to retail dealers about 52 million pounds of poultry in that year; that wholesale live poultry dealers are en-

gaged in slaughtering, drawing, eviscerating, bleeding and removing the feathers from poultry free from the restraints, prohibitions and penalties of the amended ordinance for the purpose of creating a monopoly for the wholesale dealers; that the amended ordinance arbitrarily discriminates against and oppresses and penalizes the retail live poulterers; that wholesale live poulterers also slaughter, partially bleed and remove the feathers from poultry only, and sell it to retail dressed poulterers in the City of Chicago; that retail dressed poulterers then open, clean, pluck (R. 8-9) and eviscerate the poultry causing refuse, entrails and blood to be removed therefrom, which remain in the establishment of the retail dressed poulterer; that the retail dressed poulterer is exempted from the provisions of the amended ordinance and are free from its restraints, prohibitions and penalties; that the amended ordinance unlawfully and arbitrarily discriminates against retail live poulterers and the plaintiffs in favor of retail dressed and wholesale live poulterers for the purpose of creating a monopoly for them (R. 10).

The amended complaint further alleged that said amended ordinance is unreasonable, discriminatory, confiscatory and prohibitory of the operation of retail live poultry business in the City of Chicago, and denies equal protection of the laws of Illinois and the United States (R. 11); that it has no relation to the public health, safety, morals or public welfare; that it deprives the plaintiffs of their property without due process of law under the Illinois constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States, and

deprives the plaintiffs of their property without just compensation in violation of Section 13 of Article III of the Constitution of Illinois and the Fifth Amendment to the Constitution of the United States; that the City of Chicago has ordered all of plaintiffs' businesses closed and placed "Closed" signs on the doors and have declared said businesses to be nuisances solely for non-compliance with said amended ordinance (R. 12-13); that said action on the part of the City has no relation to cleanliness or health in the community; that plaintiffs were refused their licenses and ordered to cease operating their businesses and are now being criminally prosecuted for non-compliance with said amended ordinance (R. 14).

The plaintiffs prayed for an injunction restraining the enforcement of the obnoxious amendments and for a declaratory judgment awarding a writ of mandamus to compel the City of Chicago to accept plaintiffs' applications for licenses and issue to them the several licenses (R. 16-17).

Obnoxious Provisions of the Amended Ordinance Under Attack.

On the first day of December 1950, the City Council of Chicago amended the ordinance regulating the operation of poultry stores in Chicago, and made it unlawful for retail live poultry dealers to operate in the City of Chicago without first obtaining a license, and prohibited the issuance of a license to a retail live poulterer unless the premises in which the business is to be operated contains a separate preparation room to be used exclusively for the killing and dressing of poultry. The floors must be constructed of cement or concrete or other impervious

material, and so graded and drained as to discharge all liquid waste into a properly trapped sewer or cesspool conected drain. The ceilings must be at least eight feet above the top of the floor and must be "of a smooth, hard, impervious material free from crevices, cracks, ledges or projections." The walls from the floor to the ceiling must be of white enamel bricks, or enamel tile, porcelain or enamel finished material or stainless steel. The lavatory must be completely separated from the preparation room and ventilated into the outside air (R. 18-19). Refrigeration must be established and maintained (R. 20).

Section 95-29.5 of said amended ordinance prohibits the operation of a retail live poultry business within 200 feet of a residence, public institution, or a building which manufactures food (R. 21).

Section 95-29.8 of said amended ordinance requires retail live poultry dealers to keep a record of all purchases of live poultry showing the dates of purchase, the number, weight, breed, description, and other distinguishing marks of the poultry, the name, address and description of the seller or sellers and the type of conveyance used by the seller or sellers and their vehicle license numbers (R. 22).

The Defendant's Motion to Strike the Amended Complaint and Dismiss the Suit.

The defendant filed its motion to strike the amended complaint and dismiss the suit on the grounds that a court of equity had no jurisdiction in the premises because of the insufficiency of the amended complaint and its failure to state a cause of action; and that the facts

pleaded in said amended complaint are both insufficient to warrant equitable relief and are wholly immaterial

II.

Jurisdictional Statement.

The jurisdiction of this Court is invoked pursuant to paragraphs 2 and 3 of Section 1257, Title 28, Chap. 81, of the U.S. Code.

The judgment of the Supreme Court of Illinois sought to be reviewed draws in question the validity of a municipal ordinance of the City of Chicago on the ground of its being repugnant to the Constitution of the United States, and the second decision of the Supreme Court of Illinois in favor of its validity is also repugnant to the Federal Constitution.

The validity of a Municipal Ordinance is drawn in question on the ground of its being repugnant to the Constitution of the United States and abridges the rights, privileges and immunities specially claimed by petitioners under said Constitution in the amended complaint, and the second decision of the Supreme Court of Illinois is in favor of its validity.

In its second opinion, the Supreme Court of Illinois held that the said ordinance does not contravene any rights guaranteed to petitioners under the Constitution of the United States (R. 44).

The Supreme Court of Illinois decided questions involving the rights, privileges and immunities claimed by petitioners under the Federal Constitution erroneously and contrary to the decisions of this Court, which neces-

sarily requires a decision by this Court to correct such errors to protect the rights of petitioners. *North Carolina Ry. Co.* v. *Zachary,* 232 U. S. 248, 257; *Hague* v. *Committee for Industrial Organization,* 307 U. S. 496.

The judgment of the Supreme Court of Illinois became final upon the denial of the petition of the plaintiffs for rehearing on January 19, 1953 (R. 49). This petition is filed within ninety days of said date as provided by Section 2101(c), Title 28, Chap. 133, of the U. S. Code.

III.

Questions Presented.

The ultimate questions to be decided are:

1. Whether an ordinance of the City of Chicago, which exempts all retail dressed poultry dealers and all wholesale live poultry dealers in said City from its provisions and penalties, but prohibits all retail live poultry dealers in said city from operating or continuing to operate a retail poultry business in said city, without regard to conditions of cleanliness and sanitation, unless such retail live poultry dealers construct in their establishments a separate preparation room with impervious material eight feet from the floors, and floors of concrete, and walls of glazed enamel bricks or enamel tile, porcelain or enamel finished material or stainless steel eight feet high to the ceilings and comply with other prohibitive structural requirements, is unreasonable, discriminatory class legislation, which denies plaintiffs equal protection of the law and due process of law in confiscating their properties.

2. Whether the second decision of the Illinois Supreme

Court amounts to a judicial amendment of the ordinance as amended, which excepts retail dressed poulterers and wholesale live poulterers from its operation, but prohibits retail live poulterers from operating or continuing to operate their poultry businesses unless such poulterers comply with the prohibitive financial burdens imposed upon them by Section 95-29.1 to 95-29.8 of Chapter 95 of the obnoxious ordinance is oppressive, unreasonable and discriminatory and deprives petitioners, as retail live poulterers, of their rights and property without due process of law, and denies them equal protection of the law and abridges their rights, privileges and immunities in violation of the Fifth and 14th Amendments to the Constitution of the United States.

3. Whether the restrictions imposed upon retail live poulterers by the ordinance as amended, is based upon an arbitrary and unreasonable classification, and constitutes an unwarranted and unreasonable interference with the carrying on of lawful businesses and a confiscation of the same without compensation, in violation of the Fifth and 14th Amendments to the Constitution of the United States.

4. Whether the nature and effect of the ordinance as amended is a reasonable regulation of the poultry business in the City of Chicago to protect the public health or is an arbitrary and discriminatory exclusion of live poultry dealers in said city from business in violation of the Fifth and 14th Amendments to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

1. The second decision of the Supreme Court of Illinois in affirming that part of the decree upholding the validity of Sections 95-29.1 to Sections 95-29.7, both inclusive, and reversing that part of the decree, which was not appealed from or drawn into question by either party to the cause, which held Section 95-29.8 of the obnoxious ordinance unconstitutional, and holding that the obnoxious ordinance as amended is a reasonable regulation of the retail live poultry business in Chicago, that in no way constitutes a denial of due process of law or equal protection of the laws, or other rights guaranteed by the State and Federal Constitutions, (R. 47) is erroneous in that it upholds arbitrary, discriminatory class legislation contrary to applicable decisions of this Court, and arbitrarily imposes upon petitioners the unnecessary and unconscionable physical and financial burdens of structural and refrigeration requirements.

Connolly v. *Union Sewer Co.*, 184 U.S. 540;
Truax v. *Corregan*, 257 U.S. 312, 324-5;
Norris v. *Alabama*, 294 U.S. 587,. 590;
Frost v. *Comm.*, 278 U.S. 515, 522;
Gulf Colorado and Sante Fe Ry. v. *Ellis*, 165 U.S. 150, 155, 159, 165;
Weaver v. *Palmer Bros.*, 270 U.S. 402;
Liggett v. *Baldridge*, 278 U.S. 105, 111;
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Roland Co. v. *Walling*, 326 U.S. 657, 673-75;
Justensen's Food Stores Inc. v. *City of Tulare*, 12 Cal. (2d) 324; 84 P. (2d) 140.

2. The second decision of the Supreme Court of Illinois, in affirming the decree as to Sections 95-29.1 to

95-29.7, both inclusive, and reversing the decree as to Section 95-29.8, which Section 95-29.8 was condemned as invalid by the decree, from which adjudication, neither party appealed, or filed cross appeal and which matter was not properly before the court, denied due process of law and equal protection of the law to the plaintiffs and abridged their rights, privileges and immunities, and took their property without any compensation in violation of the Fifth and 14th Amendments to the Constitution of the United States (R. 47).

Chicago Burlington and Quincy Ry. v. *Chicago,* 166 U.S. 226, 233-235;
Atchison and Sante Fe Ry. Co. v. *Vosburg,* 238 U.S. 56;
Connolly v. *Union Sewer Co.,* 184 U.S. 540;
Weaver v. *Palmer Bros.,* 270 U.S. 402, 413;
Liggett Co. v. *Baldridge,* 278 U.S. 104;
Retirement Board v. *Alton Ry. Co.,* 295 U.S. 330, 360.

3. The second decision of the Supreme Court of Illinois upholding the controverted ordinance, declared an arbitrary and unreasonable classification of the poultry business in Chicago, which has no reasonable relation to the health, safety or morals of the community and constitutes an unwarranted interference with the carrying on of a lawful retail live poultry business in Chicago and deprives such poultry dealers and petitioners of their property without compensation or due process of law and denies them equal protection of the law and imposes upon Petitioners and live poultry dealers in Chicago unreasonable, unconscionable and oppressive physical and financial burdens of unnecessary building construction and

installation of an elaborate system of keeping books and records and virtually excludes petitioners and other retail live poultry dealers from business in Chicago in violation of the Fifth and 14th Amendments to the Constitution of the United States.

Daffins v. *Los Angeles,* 195 U.S. 223;
Connally v. *Union Sewer Co.,* 184 U.S. 540;
Cotting v. *Kansas City Stock Yards Co.,* 183 U.S. 79;
Weaver v. *Palmer Bros. Co.,* 270 U.S. 402, 413;
Quaker City Cab Co. v. *Penn.,* 277 U.S. 389;
Liggett Co. v. *Baldridge,* 278 U.S. 105;
Smith v. *Texas,* 233 U.S. 630;
Fairmont Co. v. *Minn.,* 274 U.S. 1;
New States Ice Crean Co. v. *Liebman,* 285 U.S. 262, 278;
Home Teland Tel. Co. v. *Los Angeles,* 227 U.S. 278.

4. The second decision of the Supreme Court of Illinois, in predicating the validity of the obnoxious ordinance upon the existence of a zoning ordinance, which itself is vulnerable to attack and was not before the court, amended the ordinance by judicial legislation, which is itself unconstitutional, and made the ordinance enact what confessedly the city council never meant, and excluded all retail live poultry dealers in Chicago and the petitioners from operating a retail live poultry business in any district in Chicago as a matter of right, without complying with the obnoxious ordinance.

Spraigue v. *Thompson,* 118 U.S. 90, 95;
Davis v. *Wallace,* 257 U.S. 478;
Connally v. *Union Sewer Pipe Line Co.,* 184 U.S. 540;

Rutgers Chapter v. *City of New Brunswick*, 28 A. 2d 759, 762-3;

Retirement Board v. *Alton Ry. Co.*, 295 U.S. 330, 360, 362;

Coe v. *Armour Fertilizer Works*, 237 U.S. 413, 424-5.

5. The second decision of the Supreme Court of Illinois, in upholding the ordinance prohibiting the use of building materials in general use in the construction of buildings, which is not dangerous or contaminative in any way and specifying particular materials to be used denied the petitioners equal protection of the law and due process of law under the 14th Amendment to the Constitution of the United States.

Weaver v. *Palmer Bros.*, 270 U.S. 402.

PRAYER.

Wherefore, for the reasons hereinbefore set forth, plaintiffs (petitioners) pray that a Writ of Certiorari issue to review the second judgment of the Supreme Court of Illinois in this case.

Respectfully submitted,

LeRoy G. Charles
John L. Charles
Mary E. Charles
Woodrow Charles
Dock Charles and
Grady Jones,
Petitioners.

LeRoy G. Charles,
Attorney for Petitioners.

Brief in Support of Petition for Writ of Certiorari to the Supreme Court of Illinois.

Opinions Below.

The first Opinion of the Supreme Court of Illinois in this case was not reported but was filed in the Office of the Clerk of said court on May 22, 1952, under General No. 32185, and is fully set out in the Record in this cause (R. 32-37) and on pages 47-54 of this petition.

The Second Opinion of the Supreme Court of Illinois was filed November 20, 1952, under General No. 32185 aforesaid and is reported in 413 Ill. Page 428, of the Illinois Reports and also in 109 N. E. 2nd Page 790, on Pages 41-48 of the printed records, and further appears on pages 55-63 of this petition.

Jurisdictional Statement.

Petitioners adopt the jurisdictional statement appearing on Page 10 of the petition for a writ of certiorari and incorporates it in this petition.

Statement of the Case.

Petitioners adopt the statement of facts appearing on Page 2 of the petition for a writ of certiorari and incorporate it in this brief.

SPECIFICATION OF ERRORS.

The Supreme Court of Illinois Erred:

1. In its second decision in affirming that part of the decree upholding the constitutional validty of Sections 95-29.1 to 95.29.7, both inclusive of the controverted ordinance and reversing that part of the decree, which held Section 95-29.8 of said ordinance unconstitutional and void.

2. In its second decision, in not adjudicating the obnoxious amendments, under attack herein, to said ordinance to be arbitrary, discriminatory class legislation, which denies petitioners due process of law, equal protection of the law and confiscates their property without any compensation to them whatsoever in violation of the Fifth and 14th Amendments to the Constitution of the United States.

3. In its second decision, in absolutely prohibiting the use of existing buildings and future buildings constructed of material not inherently dangerous or contagious or injurious to the health, safety or morals of the community, without regard to the manner and conditions of use and without any regulation, and upholding arbitrary, discriminatory class legislation in violation of the Fifth and 14th Amendments to the Constitution of the United States.

4. In its second decision, in assuming jurisdiction of and reversing that part of the decree, which was not appealed from or questioned in any way or manner by either party to the cause by appeal or cross appeal, which held Section 95-29.8 of said controverted ordinance unconstitutional and void and thereby imposed upon petitioners in the operation of their businesses unreasonable, unconscionable

and oppressive physical and financial burdens and a wholly unnecessary and elaborate system of keeping books and records.

5. In its second decision, in upholding the validity of said controverted ordinance, which denies due process of law and equal protection of the law to petitioners and deprives them of their property without any compensation whatsoever in violation of the Fifth and 14th Amendments to the Constitution of the United States.

6. In its second decision, in holding that said controverted ordinance constituted a reasonable regulation of the poultry business in Chicago, and did not contravene either the Fifth or 14th Amendment to the Constitution of the United States.

7. In its second decision, in not holding that the controverted ordinance unconstitutionally discriminates against retail live poultry dealers in Chicago and the petitioners.

8. The second decision of the Supreme Court of Illinois, is erroneous in predicating the validity of the controverted ordinance upon the existence of a certain zoning ordinance, amended the ordinance by judicial legislation, which is itself unconstitutional, and made the ordinance enact what confessedly was not the intent of the City Council of Chicago.

Summary of Argument.

1. The plaintiffs-petitioners herein, urge that an ordinance, which exempts from its operation retail dressed poultry dealers and wholesale live poultry dealers in the City of Chicago, and prohibits the issuance of a license

to a retail live poulterer, and the operation of a retail live poultry business unless the retail live poultry dealer makes structural improvements at a cost of approximately $5000 in each establishment, with specified materials, and tear out and discard existing material, which is neither contagious nor dangerous or a health hazard, and which requires such poulterer to install and maintain an expensive refrigeration system, which is wholly unnecessary to the proper operation of such a business, with the final result that only the blood will be immediately disposed of, with no change in the disposition of other refuse, is arbitrary, discriminatory and unreasonable and denies the retail live poultry dealer due process of law, equal protection of the law and confiscates his property without any compensation in violation of the Fifth and 14th Amendments to the Federal Constitution.

2. The plaintiffs-petitioners further urge that the first decision of the Supreme Court of Illinois is correct and that the second decision of the Supreme Court of Illinois, reversed that part of the decree, which was not appealed from or drawn into question by cross appeal and was not before the court, and thereby wrongfully assumed jurisdiction in the matter, and denied petitioners due process of law and that said second decision of the Supreme Court of Illinois together with said obnoxious ordinance abridged the rights, privileges and immunities of petitioners, and took their property without any compensation, and denies petitioners due process of law and equal protection of the law, and arbitrarily denied petitioners the right to engage in a domestic business under regulations applicable alike to those engaged in the same general class of

business in violation of the Fifth and 14th Amendments to the Constitution of the United States.

3. The plaintiffs-petitioners further urge that said controverted ordinance does not have any reasonable relation to the health, morals or safety of the community, but that it is an unwarranted interference with the carrying on of a lawful useful business, and was conceived and enacted to give wholesale poultry dealers a monopoly on the poultry business in Chicago, and is being unconstitutionally administered for that purpose and denies petitioners due process of law, equal protection of the law and arbitrarily excludes petitioners from the retail poultry business in Chicago in violation of the Fifth and 14th Amendments to the Constitution of the United States.

4. The plaintiffs-petitioners further urge that the second decision of the Supreme Court of Illinois, in effect, amended the controverted ordinance by unconstitutional judicial legislation and made the ordinance enact what the city council never intended that it should enact, by attempting to limit its effective operation to zones contrary to the clear, positively expressed intent of the City Council that its effective operation should be co-extensive with the boundaries of the City of Chicago and exclude, without exception, all retail live poultry dealers from business in each and every zone and district in the City, unless they comply with the unconstitutional arbitrary physical and financial burdens imposed by prohibitive structural requirements and the installations of an expensive, unneeded and useless refrigeration system and the expensive system of keeping records and data un-

necessarily, which burdens are not imposed alike upon other businesses of the same general class in violation of the 14th Amendment to the Constitution of the United States.

5. The plaintiffs-petitioners further urge that the City Council was without the power to prohibit the use of material, not inherently contagious or dangerous without regard to the conditions of sanitation; and that the controverted ordinance constitutes arbitrary, discriminatory class legislation in violation of the Federal Constitution.

Argument.

I.

The second decision of the Supreme Court of Illinois in affirming that part of the decree upholding the validity of Sections 95-29.1 to Sections 95-29.7, both inclusive, and reversing that part of the decree, which was not appealed from or drawn into question by cross appeal, which held Section 95-29.8 of the obnoxious ordinance unconstitutional, and holding that the obnoxious ordinance as amended is a reasonable regulation of the retail live poultry business in Chicago, that it in no way constitutes a denial of due process of law or equal protection of the laws, or other rights guaranteed by the State and Federal Constitutions, (R. 47) is erroneous in that it upholds arbitrary, discriminatory class legislation contrary to applicable decisions of this Court, and arbitrarily imposes upon petitioners the unnecessary and unconscionable physical and financial burdens of structural and refrigeration requirements.

We agree with the Supreme Court of Illinois that all phases of the poultry business in Illinois are subject to reasonable regulation by the respondent herein. But we cannot agree with the analysis in the second decision of that learned court. Section 40-2 of Chap. 13 of the Building Code of Chicago classifies buildings existing at the time of its adoption or later designed, erected, altered or converted according to their occupancy, use and construction in accordance with the building provisions of the code. The building commissioner is authorized to classify

all buildings not classified by the code. Section 40-6 of the same chapter of the code defines a business unit as:

> "Any building or part of a building designed intended, or used as an office unit, a financial unit, a sales unit, a storage unit or a manufacturing unit."

Chapter 50 of the Building code provides for all structural requirements for business units; Section 50-8 of Chapter 50, provides that business units of ordinary or superior type of construction fifty feet or less in height, or more than two stories high, if of ordinary construction, ceilings and partitions shall be covered with metal lath and plaster; that if the unit is not more than two stories high, ceilings, and partitions may be covered with wood laths and plaster or other material of equal fire resistive value.

The admitted facts show that petitioners obtained official inspection and approval of the buildings in which they operate their businesses before entering into their leases for the same (R. 4-5). The ordinance under attack excludes petitioners from the retail live poultry business unless they spend at least $5000 remodelling each store (R. 8) over the objection of their landlords (R. 7).

The analysis made in the second decision of the Supreme Court of Illinois is both general and inaccurate. Operators and employees only use the preparation rooms of retail dressed poultry dealers, wholesale live poultry dealers and retail live poultry dealers. Plastered walls will inoculate the employees of retail dressed poutry dealers and wholesale live poultry dealers as easily as they will the employees of retail live poultry dealers. Toilet doors opening into the preparation rooms of the retail

dressed poultry dealers and wholesale live poultry dealers will contaminate the poultry being prepared for sale as easily and as quickly as that prepared by retail live poultry dealers. The admitted facts show that each fowl is weighed and sold by the retail live poulterer before it is killed and dressed and is immediately taken from the establishment by the customer (R. 2). There is no need or use for a refrigeration system. But the ordinance under attack compels retail live poulterers to install an expensive refrigeration system (R. 20).

In its second decision the Supreme Court of Illinois relied upon the declaration in the preamble of the ordinance that live poultry is delivered in crates that become soiled; that they remain on the side walk for long periods of time; that in opening up the fowls refuse, blood and feathers remain for a considerable time and create a nuisance, which attracts rats and vermin (R. 45). The present ordinance requires that all such business establishments be kept in a clean and wholesome condition and adequately ventilated so as to insure free circulation of fresh air at all times; that they shall be kept free from rats, mice, flies and other insects (R. 3). The admitted facts show that petitioners have done all of these things as attested by official inspectors (2-3, and 5).

The Illinois Supreme Court never pointed out in its second decision that the specified walls and troughs of enamel bricks or enamel tile or stainless steel are more antibacterial or bactericidal or innocious than plastered walls. The court never pointed out that the specified material is an antidote or an antitoxin. That learned

court did not point out that the specified material is more innoxious or antibromic or more of a deodorant than walls of metal laths and plaster. The Illinois Supreme Court never pointed out that the specified material is more innoxious or innoculable than the condemned material. The ordinance exempts retail dressed poulterers and wholesale live poulterers from its provisions.

In its second decision the Illinois Supreme Court said that Section 194 A-12 (2) of the Municipal Code of Chicago confined wholesale poulterers to manufacturing districts (R. 47).

Said Section 194 A-12 (2) reads as follows:

> "Manufacturing districts. Permitted uses in manufacturing districts are: (2) Poultry game and small animal hatching, raising, breeding, killing, packing and storage for wholesale distribution."

Section 194 A (11) of that same code is as follows:

> "Commercial districts. Permitted uses in commercial districts are: (1) Any use permitted in a business district; (2) Wholesale produce market."

In the case of *State* v. *Hurst*, 41 P (2d) 1079, 1081, (OR.) the court said:

> "In defining the term 'produce' to include 'fruits, vegetables, live and dressed poultry, dressed veal, pork, mutton and beef."

The legislature had reference to food products. We contend that only wholesale live poulterers, who hatch, raise, kill and store poultry for distribution are confined to manufacturing districts; and that those who buy, slaughter and sell poultry to retail dealers may legally operate in a business district. We are supported in this

contention by the definition and analysis of "wholesale" and "retail" by this court in *Roland Co.* v. *Walling,* 326 U. S. 657, 673-76.

An analysis of the controverted ordinance and the second decision of the Supreme Court of Illinois will disclose that the ordinance is discriminatory irrespective of its purpose. Assume that petitioners comply with the ordinance, the only refuse immediately disposed of is blood. The entrails, feces and feathers will remain until carted away. The admitted facts show that much dressed poultry is defeathered and partially bled and sold to retail dressed poulterers; that the preparation is completed by the retail dealer in his preparation room, in which remains blood, feces and entrails (R. 9-10). The effect of the holding of the second decision of the Supreme Court of Illinois is that feathers and an undetermined amount of blood, in excess of that remaining in retail dressed poulterers' preparation rooms, constitute a nuisance, but that the blood, feces, and entrails remaining in the establishments of retail dressed poulterers do not constitute a nuisance. In the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 560, this Court held invalid an Illinois Statute which proscribed all commercial combinations, except those composed of producers of agricultural commodities and raisers of live stock. This court held the statute to be arbitrary, unreasonable, discriminatory and a denial of equal rights under the 14th Amendment to the Federal Constitution. On page 563, this Court said that a State cannot by legislation divide those engaged in domestic trade into classes and make criminals of one class if they do certain forbidden things, while allowing

another of the same general class engaged in the same domestic trade to do the same things with impunity. The exemption of the retail dressed poulterer is unreasonable, arbitrary and discriminatory.

In the case of *Truax* v. *Corregan,* 257 U. S. 312, 324-5, this court said that when the facts alleged are admitted by demurer, this court will analyze the facts to determine whether a federal right has been wrongly denied the plaintiff by the decision of the State Court upon the facts pleaded and admitted by demurrer in violation of the 14th Amendment to the Federal Constitution. In *Weaver* v. *Palmer,* 270 U. S. 402, 413, this Court cited with approval an Illinois case holding that to prohibit the use of material not inherently dangerous which may be rendered safe by reasonable regulation violates the personal and property rights guaranteed by the constitution.

In the case of *Liggett* v. *Baldridge,* 278 U. S. 105, 113, this court held that a State cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. We contend that the ordinance, on its face, forbids to petitioners the exercise of a fundamental property right and arbitrarily imposes upon them unconstitutional physical and financial burdens, not borne by their competitors. The unconscionable structural requirements and the installation of an unneeded refrigeration system are oppressive, arbitrary and unreasonable and bear no substantial relation to the health, morals, welfare, or safety of the community; that the controverted ordinance denies petitioners due process of law and equal protection of

the law, and is arbitrary discriminatory class legislation, which is forbidden by the Fifth and 14th Amendments to the Constitution of the United States.

II.

The second decision of the Supreme Court of Illinois in affirming the decree as to Sections 95-29.1 to 95-29.7, both inclusive, and reversing the decree as to Section 95-29.8, in which Section 95-29.8 was condemned as invalid by the decree, from which adjudication, neither party appealed, or filed cross appeal and which matter was not properly before the court, denied due process of law and equal protection of the law to the petitioners and abridged their rights, privileges and immunities, and took their property without any compensation in violation of the Fifth and 14th Amendments to the Constitution of the United States (R. 47).

The Supreme Court of Illinois said the Chancellor held Section 95-29.8 of the ordinance void; that since appellants have not seen fit to defend that determination in their brief, and that there was no proof introduced on the hearing below indicating that the provisions of that section of the ordinance are unreasonable, the presumption of its validity prevailed (R. 47, 48). The respondent did argue the validity of this section of the ordinance in its brief, but petitioners stated clearly, on page one of their reply brief that the validity of that section of the ordinance was not in dispute because the respondent did not file a cross appeal. In the case of *Heine* v. *Degen*, 362 Ill. 359, 380, the Supreme Court of Illinois said:

"Rule 35.-(1) Each appellee who desires to prosecute a cross-appeal from all or any part of the judgment, decision, order or decree, and each co-party who did not join in the notice of appeal but who desires to join as appellant or to prosecute a separate appeal, shall, within ten days after service of notice of appeal, serve a notice upon each party or attorney or firm of attorneys who signed the notice of appeal, and upon each appellee, or in case of a crossappeal upon each co-appellee, and file a copy thereof in the trial court."

Although, the court held that cross appeal was properly filed in the *Degan* case, we were entitled to rely upon the Court's construction of its own rule and refuse to argue matters excluded from its consideration by the rule made by that court as a guide to the legal profession. We contend that to relax the rule in this particular case subjected petitioners to a special procedure inconsistent with the plain language of the rule and the court's own construction thereof, and so adversely affected the substantial rights of the petitioners that they were denied due process of law. *Chicago, Burlington Ry.* v. *Chicago,* 166 U.S. 226, 234-35.

The Illinois Supreme Court further said that petitioners were bound to present clear and convincing evidence of the invalidity of the section of the ordinance held invalid. (R. 48). This holding is inconsistent with the holdings of the Supreme Court of Illinois in *City of Chicago Hts.* v. *Rub. Service Co.,* 408 Ill. 604, 606, 608, *Giebelhausen* v. *Daley,* 407 Ill. 25, *Lombardo Wine Co.* v. *Taylor,* 401 Ill. 454, 457, *Baim* v. *Fleck,* 406 Ill. 193, 194, *McDougall* v. *Lueder,* 389 Ill. 141, *Forsythe* v. *Village of Cookville,* 356 Ill.289,

Winter v. *Barrett*, 352 Ill. 441 and *Frazier* v. *Shelton*, 320 Ill. 254, in all of which cases ordinances and statutes were declared unconstitutional upon demurrer or motion to strike and dismiss. In the case of *Truax* v. *Corrigan*, 257 U.S. 312, 324-25, this court held that facts alleged and admitted by demurrer are binding on the court, and that this court will analyze the facts and determine for itself whether plaintiffs' legal rights under the 14th Amendment have been violated. The second decision of the Supreme Court of Illinois is a capricious departure from the settled law of Illinois, both substantive and procedural and deprived the petitioners of their legal rights. *Truax* v. *Corrigan Supra.*

The exception to the principles laid down in these cases is found in *Nakwosas* v. *Western Paper Stock Co.*, 260 Ill. 172 and *Freitag* v. *Union Stock Yards*, 262 Ill. 551, which hold that a demurrer on the ground that an act was not passed in accordance with the prerequisites of the constitution—must set up the steps taken by the legislature and introduce the entries in the journals of the house and senate or a certificate of the Secretary of State. The exception held by this court deals with price differentials in *Bordens Co.* v. *Baldwin*, 293 U. S. 194. These cases simply hold that facts not in the range of common knowledge of all the people cannot be admitted by demurrer.

In its second decision, the Supreme Court of Illinois said that Section 95-29.8 of the obnoxious ordinance is designed to aid the municipal authorities in controlling the traffic in diseased and stolen poultry and fowl, by enabling them to trace the source of supply (R. 48). Section 95-29.8 is found on page 27 of the record herein. This is a

most capricious and arbitrary holding by the court. It is admitted that the United States Government statistics show that wholesale live poultry dealers are slaughtering and selling to retail dressed poultry dealers in Chicago about fifty-two million pounds of poultry in one year (R. 8-9). Retail live poultry dealers kill and dress the chickens as each one is sold (R. 2-3). They buy chickens in small lots. But the Illinois Court assumed that all thieves and peddlers of diseased poultry deal only with retail live poultry dealers and that retail live poultry dealers are the only dealers dishonest enough to buy such unfit or stolen poultry. This is an arbitrary and capricious assumption, because the section, if upheld by this court, is wholly inadequate and not designed to control the traffic in either stolen or diseased poultry. Thieves and peddlers of stolen and diseased poultry will sell to wholesale dealers as readily as they will to retail live poultry dealers. The authorities should be just as anxious to trace the source of supply of such poultry regardless of who bought it or held it for sale. Diseased poultry handled by wholesale poulterers is just as dangerous as that handled by retail live poulterers. This section places an unconstitutional, unreasonable, unconscionable and oppressive burden upon petitioners and retail live poulterers regardless of how honest and fair they are in the conduct of their business and denies them due process of law and equal protection of the law. *Retirement Board* v. *Alton R. Co.*, 295 U.S. 330, 360.

In the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 559-60, this court held that due process of law and equal protection of the laws mean that laws must operate on all alike, and must not subject the individual

to an arbitrary exercise of the powers of government; that all persons engaged in trade or sale of merchandise and commodities within the state and within the same general classification must be subject to regulation, applicable alike to all under like conditions; that classification of persons and firms and corporations must be to subserve public object and must rely upon some difference, which bears a reasonable and just relationship to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis; that arbitrary selection can never be justified by calling it classification; that the equal protection of the law demanded by the 14th Amendment forbids this.

We therefore earnestly contend that Section 95-29.8 of said obnoxious ordinance is unconstitutional, arbitrary and discriminatory and places upon petitioners and other retail live poultry dealers in Chicago unconsciable physical and financial burdens not placed upon other in the same general class and is invalid under the 14th Amendment to the Constitution of the United States.

III.

The second decision of the Supreme Court of Illinois upholding the controverted ordinance, declared an arbitrary and unreasonable classification of the poultry business in Chicago, which has no reasonable or logical relation to the health, safety or morals of the community and constitutes an unwarranted interference with the carrying

on of a lawful retail live poultry business in Chicago and deprives such poultry dealers and petitioners of their property without compensation or due process of law, and denies them equal protection of the law, and imposes upon petitioners and live poultry dealers in Chicago unreasonable, unconscionable and oppressive physical and financial burdens of unnecessary building construction and installation of an elaborate system of keeping books and records and virtually excludes petitioners and other retail live poultry dealers from business in Chicago in violation of the Fifth and 14th Amendments to the Constitution of the United States.

The admitted facts in the record show that the wholesale poulterers in Chicago are performing, with impunity, the identical acts that are being performed by petitioners and which are condemned and made criminal by the obnoxious ordinance as a nuisance with respect to petitioners (R. 9, 13); that retail dressed poulterers in Chicago buy partially bled and defeathered poultry from wholesale dealers and open, clean, pluck, (R. 9) eviscerate and finish bleeding the dressed poultry, and cause refuse, entrails and blood to be and remain in such establishments and that the wholesale and retail dressed poulterers are arbitrarily exempted from the operation of the ordinance (R. 10). The first decision of the Supreme Court of Illinois correctly held that there was no reasonable and substantial relation between the difference in marketing poultry, and the public interest in health and sanitation; that the ordinance was directed to slaughtering operations and not to the manner in which poultry was sold; that whether poultry was slaughtered by a wholesaler or a

retailer, the conditions under which it is slaughtered are equally important to the public health. (R. 35).

The admitted facts show that petitioners have been ordered by the city employees to close each of their stores until they comply with said obnoxious ordinance; that the city has placed "closed" signs on their doors and declared each store to be a nuisance (R. 13); that the mayor has directed the revocation of their licenses and directed the police to arrest, imprison and prosecute petitioners for non-compliance with said ordinance (R. 14).

The admitted facts show that the petitioners are conducting each of their stores in a clean and sanitary manner as required by all of the laws of health of the city and state and that they are officially inspected; that the stores in which petitioners operate were and are officially inspected and were officially declared suitable and proper (R. 2-5). All of these outrages are committed against petitioners, not because they are committing any nuisance, but because they are operating retail live poultry businesses within the territorial limits of the City of Chicago. In the case of *City of New Orleans* v. *New Orleans B. Co-Op,* Abattoir 96 So. 113, an ordinance prohibited the business of rendering lard, oil, fat, grease or other substance of kindred character, from animals or animal matter in the City of New Orleans. The Court held that the ordinance did not undertake to regulate, but it arbitrarily suppressed a legitimate and harmless business in violation of the 14th Amendment to the Constitution of the United States.

The ordinance in question was not enacted for the benefit of the general public, but its sole purpose is to benefit a particular class, the wholesale poulterers. The action

of the City Council is a mere excuse for the unjust discrimination, oppression and spoliation of a particular class, the retail live poulterers, who alone stand between the wholesalers and a complete monopoly. The petitioners are being despoiled and denied due process of law and equal protection of the law under the 14th Amendment to the Constitution of the United States. *Dobbins* v. *Los Angeles*, 195 U.S. 223, 236-37 and *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 558.

In the case of *Cotting* v. *Kansas Stock Yards Co.*, 183 U.S. 79, this court condemned a state statute which regulated the charges of a certain stock yard company, and which exempted other like companies from its operation, and held the statute to be a denial of equal protection of the laws forbidden by the 14th Amendment. In the case of *Weaver* v. *Palmer Bros.*, 270 U.S. 403, a Pennsylvania statute regulating the manufacture and sale of bedding, forbade the use of shoddy in manufacturing the articles. On Page 403 this court said that all dangers to health may be eliminated by appropriate treatment of shoddy at low cost. On Page 412 this court said that there is no evidence that any sickness or disease was ever caused by the use of shoddy; that the record contains persuasive evidence and opinions of scientists eminent in fields relating to public health, that the transmission of disease is almost entirely by immediate contact with or close proximity to affected persons; that such bacteria perish rapidly when separated from human or animal organisms; that upon that evidence the absence of sterilization or disinfection would be of little danger to health even to users of comfortables filled with shoddy, new or second

hand. On page 413 the court said legislation that goes beyond mere regulation and prohibits the sale of second hand quilts and comfortables even when sterilized or remade from sterilized second hand materials or prohibits the use of materials not inherently dangerous that might be rendered safe by reasonable regulation, transgresses the constitutional protection of personal and property rights. On page 415 this court said the business involved is legitimate and useful, but that it is subject to all reasonable regulations; that the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the 14th Amendment.

The City of Chicago has a building code regulating the construction of business properties and has health ordinances, and the buildings in use by petitioners have been approved as to all materials used, and the structural arrangements for the particular businesses, and the ordinances in question arbitrarily and unreasonably imposes upon petitioners and retail live poulterers in Chicago the burden of remodeling existing buildings at prohibitive cost and prohibits the use of material which is not in any way dengerous to the health, safety or morals of the community and plainly forbids the exercise of ordinary property rights, and on its face, denies what the constitution guarantees and arbitrarily interferes with private business and prohibits the operation of a lawful business in violation of the 14th Amendment to the Constitution of the United States. *Liggett Co.* v. *Baldridge*, 278 U.S. 105, 112-13.

The obnoxious ordinance arbitrarily prohibits petitioners and retail live poulterers from engaging in a lawful private business. Such action on the part of the State denies due process of law and equal protection of the law under the 14th Amendment to the Constitution of the United States. *New State Ice Cream Co.* v. *Liebman,* 285 U.S. 262, 278.

An ordinance cannot be made valid by any declaration in its preamble, if it is unreasonable and opposed to the constitution. *Yates* v. *Milwaukee,* 10 Wall 497, 19 L. Ed. 984. There must be a real connection between the actual provisions of a police regulation and its avowed purpose to be valid as a legislative exercise of police power. The legislation must be clearly demanded for the public safety, health, safety, morals or general welfare. *McCoy* v. *Town of York,* 8 S.E. 2d 905, 907.

The record discloses in the case at bar, that the petitioners and retail live poulterers will be the only poulterers operating in the City of Chicago, who will suffer harm by the enforcement of this obnoxious ordinance. Their overhead will be increased, causing them to increase the prices of their poultry to the resultant benefit of their competitors, and the wholesalers in particular. Therefore, petitioners as retail live poulterers are being arbitrarily and unreasonably discriminated against in favor of other local poulterers in the same general classification; that the effect of the ordinance and its professed object as stated in the preamble are not in harmony.

Under the guise of protecting public health and welfare, this ordinance is passed, in which the inevitable and

evidently intended effect is to prevent the legitimate use by petitioners of legally suitable buildings and equipment in carrying on their business in the most sanitary and inoffensive manner and is unreasonable, arbitrary and void and denies petitioners due process of law and equal protection of the law and excludes them from business in violation of the 14th Amendment to the Constitution of the United States. *McCoy* v. *Town of York,* 8 S.E. 2d 905, 907-8.

No evidence, however clear and convincing, as required by the second decision of the Supreme Court of Illinois, can be as convincing of the arbitrary and discriminatory nature of the obnoxious ordinance, as its nature and effect which appear clearly on its face.

IV.

The second decision of the Supreme Court of Illinois, in predicating the validity of the obnoxious ordinance upon the existence of a zoning ordinance, which itself is vulnerable to attack and was not before the court, amended the ordinance by judicial legislation, which is itself unconstitutional, and made the ordinance enact what confessedly the city council never meant, and excluded all retail live poultry dealers in Chicago and the petitioners from operating a retail live poultry business in any zone or district in Chicago as a matter of right, without complying with the obnoxious ordinance.

The first decision of the Supreme Court of Illlinois held that the obnoxious ordinance does not regulate the places or locations where the retailers may operate their business and that it is not a zoning ordinance: that the

zoning ordinance relied upon by the respondent herein is no answer to the constitutional objection made and urged (R. 35). The second decision of the Supreme Court of Illinois based its adjudication that the ordinance is valid upon that same ordinance rejected in the first decision (R. 47). We agree with the first decision of the Supreme Court of Illinois, which said that Section 194 A-12 (2) of the Zoning Ordinance was itself vulnerable to attack and that the constitutionality of the obnoxious ordinance could not rest upon such an ordinance.

The obnoxious ordinance under attack excludes petitioners and all retail live poulterers from business anywhere within the territorial limits of the City of Chicago, unless compliance is made with the ordinance. It is not a zoning ordinance and its plain language makes it coextensive with the boundaries of the city. In the case of *Spraigue* v. *Thompson,* 118 U.S. 90, 95 this court held that the construction placed by the Supreme Court of Georgia on a Georgia statute made the statute enact what confessedly the legislature never meant; that such construction conferred upon the statute a positive operation beyond what the legislature intended and beyond what anyone can see it would have enacted. This court rejected such construction and condemned the statute as invalid.

In the case of *Davis* v. *Wallace,* 257 U.S. 478, 484, this court held that where the legislative intent clearly appeared on the face of the enactment, if the court by construction changed the clear intent of the legislature, it would mutilate the statute and garble its meaning; that the legislative intent must not be confounded with their

power to carry their intention into effect; that to refuse to give force and vitality to a provision of law is one thing and to refuse to read it is a very different thing. This court adhered to the same principles of construction in *Retirement Board* v. *Alton R. Co.*, 295 U.S. 330, 362.

We contend that the construction placed upon the ordinance by the Supreme Court of Illinois, in its second decision, constituted an unconstitutional judicial amendment of the ordinance, which is unreasonable and unconscionably burdensome and oppressive upon petitioners and denies them due process of law and equal protection of the law. In the case of *Rutgers Chapter* v. *City of New Brunswick*, 28 A. 2d 759, 762, the trial court had placed an erroneous construction upon a statute guaranteeing tax exemptions to certain concerns and the Supreme Court of New Jersey was reviewing the decree. The court said the enacting clause stripped of the limitations is not the legislative expression; that such construction would bring about an effect different from that designed by the legislature; that such construction was in defiance of the declared legislative will; that if the enforcement of a statute with a constitutionally vicious provision eliminated would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative, Citing *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540.

It is clear from the language of the ordinance itself that petitioners are excluded from operating in any district, business or manufacturing within the territorial limits of the City of Chicago, without compliance with the

obnoxious ordinance, and that they cannot operate as a matter of right in any zone or district anywhere in the city under the ordinance. They could operate only as a matter of official grace or favor or discretion, which this court held cannot be deemed a substantial substitute for the due process of law that the constitution requires; that it is not enough that parties may by chance enjoy or exercise rights denied them by law or have notice of a proceeding against them or that they may as a matter of favor or grace exercise such rights, but the law must both give them their rights and protect the parties in the exercise of such rights. *Coe* v. *Armour Fertilizer Works*, 337 U.S. 413, 424-25. The court was dealing with a situation where notice was not officially required to be given by the statute with respect to tax assessments. On page 425 this court said if the statute did not provide for notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment; that it is not what notice, uncalled for by the statute, the tax payer may have received in a particular case that it is material, but the question is whether any notice is provided by the statute. We earnestly contend in this case that under the plain language of the ordinance and the legislative intent expressed therein, if the petitioners move their business next door to a wholesale poulterer even in a manufacturing district anywhere in the City of Chicago, they would be in violation of the ordinance and subject to punishment as criminals, while the wholesaler would be exempted, although the wholesaler does a much larger business than petitioners. The erroneous construction found in the second decision of the

Supreme Court of Illinois intensifies the arbitrary, discriminatory and prohibitive physical and financial burdens imposed upon the retailers and the viciousness of the exemption of competitors engaged in the same general class of business and denies petitioners due process of law and equal protection of law in violation of the 14th amendment to the constitution of the United States. *Connolly* v. *Sewer Pipe Co.*, 184 U.S. 540, 560.

The purpose of the ordinance remains the key to the words defining its coverage and also defining its exemptions from coverage. There never was an intent expressed to exclude the wholesale live poultry dealers from business districts in Chicago.

V.

The second decision of the Supreme Court of Illinois, in upholding the ordinance prohibiting the use of building materials in general use in the construction of buildings in which retail live poultry dealers operate and specifying particular materials to be used, denied the petitioners due process of law and equal protection of the law under the 14th Amendment to the Constitution of the United States.

The obnoxious ordinance forbids the issuance of a license to a retail live poulterer unless the preparation room be used exclusively for killing and dressing poultry with floors constructed of cement or concrete or other impervious material, so graded and drained as to discharge all liquid waste into a properly trapped sewer or cesspool converted drains. The ceilings must be at least eight feet above the top of the floor and must be "of smooth,

hard, impervious material free from crevices, cracks, ledges or projections." The walls from the floor to the ceiling must be of white enamel bricks, or enamel tile, porcelain or enamel finished material or stainless steel. The toilet must be completely separated from the preparation room and ventilated into the outside air (R. 18-19). A system of refrigeration must be established and maintained (R. 20). It prohibits a retail live poulterer from operating within 200 feet of a residence, a public institution or building in which food is manufactured (R. 21).

The building code of Chicago classifies and defines business property in the City of Chicago and provides the specifications for their construction, including the kind and quality of the materials to be used. All buildings constructed or to be constructed designed and adapted to business uses in compliance with the building code of Chicago are proscribed by this arbitrary and vicious ordinance, by a legislative fiat. It makes that which is lawful, useful and harmless within the City of Chicago for all other poulterers to do, unlawful and criminal for retail live poulterers, except upon onerous conditions not imposed upon other poulterers of the same general class. The proscribed businesses and operators thereof, are excluded from all buildings in said city, which are available to other businesses and operators, except upon onerous conditions not imposed upon other members of the same general class or business operators generally. Said obnoxious ordinance arbitrarily punishes the refusal of retail live poulterers to submit to such conditions and arbitrary discriminations by criminal prosecution and a confiscation of business. In the case of *Weaver* v. *Palmer*

Bros. Co., 270 U.S. 402, 415, this court held that the absolute prohibition of the use of a particular material in a legitimate and useful business is purely arbitrary and violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The respondent does not pretend or contend that common knowledge or experience, or scientific investigation, has given assurance that clean and sanitary walls, ceilings and floors of tested durable building materials, used generally in the construction of buildings are generally or universally more contagious than the materials specified in the obnoxious ordinance. The specified materials have no inherent bactericidal qualities or efficiency to purify an atmosphere murky with stench. The claim of unsanitary conditions that breed mice and rats and stench have no factual support in the record.

There is no factual support in the record that buildings constructed of time tested durable materials in general use in Chicago are more contaminative or contagious than the materials specified in the ordinance. There is no factual support in the record that buildings in Chicago, constructed of materials specified by the building code of Chicago have any characteristic inherence inducive to and productive of unsanitary conditions and nuisances. There is no factual support in the record, or claim that by common knowledge or scientific investigation the materials specified in the obnoxious ordinance possess exceptional and inherent qualities of purity, sanitation or immunization. We therefore conclude that the City Council exceeded its powers in enacting the arbitrary, discriminatory and monopolistic ordinance.

Conclusion.

For the reasons stated and on the basis of the argument herein made, we urge that the petition of the plaintiffs (Petitioners) for a writ of certiorari to review the judgment of the Supreme Court of Illinois be granted.

Respectfully submitted,

LeRoy G. Charles,
Attorney for Petitioners.

APPENDIX.

FIRST OPINION OF THE SUPREME COURT OF ILLINOIS.

[fol. 45] IN THE SUPREME COURT OF ILLINOIS

OPINION—Filed May 22, 1952

Docket No. 32185—Agenda 22—January, 1952

LeRoy G. Charles *et al.*, Appellants, v. The City of Chicago, Appellee.

Mr. JUSTICE CRAMPTON delivered the opinion of the court: The plaintiffs, operators of a retail live-poultry business in Chicago, brought suit in the circuit court of Cook County against the city, praying for an injunction to restrain defendant from enforcing an ordinance regulating the handling and slaughtering of live poultry in retail food establishments. Defendant filed a motion to strike the complaint and dismiss the suit. After hearing arguments on the motion the court entered a decree enjoining defendant from enforcing certain provisions of the ordinance requiring the keeping of records, which provisions it held unconstitutional and void. The remaining provisions of the ordinance were found to be valid, and as to such matters the suit was dismissed for want of equity. The court thereafter signed a certificate of importance, and plaintiffs appeal directly to this court on the ground that the validity of a municipal ordinance is involved.

The ordinance in question was passed on December 1, 1950. It amends chapter 95 of the municipal code of Chicago by inserting therein sections 95-29.1 to 95-29.8. It also repeals section 95-21.1, and amends sections 130-10 and 130-13 of the code. The ordinance declares it unlawful

for any person to sell at retail, or to slaughter for sale at retail, any live poultry or other live fowl without first obtaining a license. It is then provided that no license shall be issued unless the premises on which the poultry or fowl is slaughtered or to be slaughtered meet all of a number of designated requirements. A separate preparation room is required, which must be used exclusively for the killing and dressing of poultry. Its floors must be constructed of "cement, concrete or other approved water-tight nonabsorbent material so graded and drained as to discharge all liquid matter into properly trapped sewer or cesspool-connected drains." The ceiling must be at least eight feet above the floor and must be "of a smooth, hard, impervious material free from crevices, cracks, ledges or projections." The walls must be "of enamel brick, enamel tile or any other impervious material to the entire height of the ceiling. The junctions with the ceilings and floors shall be made with a six-inch sanitary cove base of glazed tile or [fol. 46] brick." The room must be provided with "a killing trough with a minimum width of 1 foot and a minimum depth of 1½ feet, and approved by the Board of Health. The walls and face of the trough must be of white glazed brick or tile, porcelain or enamel-finished metal, or stainless steel, and shall discharge over properly trapped and sewer-connected drains. Proper receptacles shall be provided for the holding, storing or keeping of all refuse material. All equipment shall be of enamel, enamel tile, steel or other impervious and readily cleanable material. The preparation room and all equipment therein shall be cleansed each day after the slaughtering for the day has been completed."

Requirements are also prescribed for ventilation, lighting, hot water, screens, the location of toilet rooms, the location and disposition of crates, cages or batteries, the disinfection of empty crates and receptacles for refuse, the disinfection and daily removal of feathers and refuse material, the manner in which live poultry must be kept, and other details of conducting the business in question. Under the terms of the ordinance its provisions are applicable only to persons who keep or slaughter live poultry "for sale at retail."

It is plaintiffs' contention that the ordinance, by omitting from its coverage similar operations of wholesale poultry dealers and retail dressed-poultry dealers, arbitrarily discriminates against retail live-poultry dealers. It is alleged in the complaint, and admitted by the motion, that the operations of killing, bleeding, plucking, drawing and eviscerating poultry, performed by plaintiffs after their customers have selected and made purchases, are also performed by wholesale poultry dealers in the city; that many retail poultry dealers in the city purchase poultry which has been only slaughtered, plucked and partially bled; that the sale of such dressed poultry by the retail dressed-poultry dealers necessarily requires that it be opened, cleaned and eviscerated, causing refuse, entrails and blood to be removed therefrom; and that the only difference between plaintiffs' operations and those of retail dressed-poultry dealers is that the former also slaughter the poultry and remove the feathers.

The complaint also sets forth in detail the manner in which plaintiffs conduct the slaughtering of poultry. It alleges that all equipment is thoroughly cleaned every day,

and that the premises are kept and maintained in a clean, sanitary condition, and in compliance with all rules of the board of health. It is further alleged that plaintiffs hold [fol. 47] long-term leases on their store buildings; that the construction provisions of the ordinance would require substantial alterations in the buildings, to which their lessors will not consent; and that under prevailing costs of construction a compliance with the ordinance would force plaintiffs out of business.

The first question presented is whether the failure to impose the same restrictions upon others engaged in the business of slaughtering live poultry for sale renders the ordinance invalid. The determination of this question depends, in turn, upon whether the discrimination made bears a reasonable relation to the purposes to be accomplished by the ordinance. A classification made by a statute or ordinance is never arbitrary when there is some reasonable basis for the differentiation between the classes or subject matters included as compared to those excluded from its operation. (*Father Basil's Lodge, Inc.* v. *City of Chicago*, 393 Ill. 246.) But there must be some reasonable connection between the distinction made and the purposes of the ordinance. Whether the differences between wholesalers and retailers can support the present ordinance depends upon its object or purpose. What would serve for a classification for some purposes may furnish no reason whatever for a classification for other purposes. See *Father Basil's Lodge, Inc* v. *City of Chicago*, 393 Ill. 246, 259.

The manifest purpose of the present ordinance is the promotion of health and sanitation. The difference between the class of persons included and the class excluded is that

in the one case the persons slaughtering poultry sell directly to consumers while in the other they sell to retail poultry dealers who in turn sell to the consumers. Is there a reasonable and substantial relation between this difference in marketing the poultry, and the public interest in health and sanitation? We can perceive none. The provisions of the ordinance are directed to the conduct of slaughtering operations; they do not concern the manner in which the product is sold. Whether poultry is slaughtered by a wholesaler or a retailer, the conditions under which the slaughtering is conducted are equally important to public health. The dangers arising from unsanitary premises or equipment are not more likely where poultry is slaughtered for sale at retail than where it is slaughtered for sale to intermediate dealers. If the prescribed requirements are appropriate in the one case they are equally appropriate in the other, where the operations to be regulated are the same. [fol. 48] Defendant insists: "The fact that wholesale poultry dealers do the same things as the retail live poultry dealers does not put both in the same class for legislative purposes." In support of this position it states that Chicago has certain zoning laws permitting retail live-poultry stores in business districts from which poultry killing for wholesale distribution is excluded; that such districts are near where people live or collect in large numbers; and that the odors of slaughter, the attraction of rats, and the filth associated with the business create a nuisance and a health hazard "which justifies the classification, necessitates the regulation, and affords a compelling need for regulating the distance of slaughter of poultry from the specified places." The argument is no answer to the con-

situtional objection here. The present ordinance does not purport to regulate the places or locations in which the operations in question may be conducted. It is not a zoning ordinance. It regulates the slaughtering of poultry by persons who sell at retail, wherever the business may be located, while leaving untouched other persons who perform the same operations constituting the subject of the regulations. The fact that Chicago may have the zoning ordinances referred to cannot supply a reasonable basis for the classification where none exists in their absence. The validity of ordinances such as that in the case at bar obviously cannot be predicated upon the existence of other ordinances not before the court, which ordinances themselves may be subject to constitutional objections, or may at any time be modified, changed, or repealed. It is apparent that no distinction has been shown between slaughtering by wholesale dealers and slaughtering by retail dealers, which would provide a reasonable basis for the classification made by the ordinance. We conclude, therefore, that the classification is unlawful and discriminatory in its nature, and renders the ordinance invalid.

It is well settled that under proper delegation of police power a municipality may, by reasonable and appropriate ordinances, regulate the conduct of any occupation, business or activity which might otherwise injuriously affect the health or safety of its citizens. But when it attempts to do so by confining the regulation to only some of those engaged in the same general business, the classification must rest on some difference related to the objects of the ordinance. A mere difference in classification does not meet [fol. 49] the constitutional requirement. Unless it has a

reasonable connection with the purpose to be accomplished, it constitutes an arbitrary discrimination and renders the ordinance void. *Chicago Park Dist.* v. *Canfield,* 382 Ill. 218.

It is one of the highest duties of the courts to carefully enforce constitutional provisions intended to secure equality of rights. Equally in right, privilege and burden is the thought running through our constitution and laws, and legislation which creates inequality based on no relevant difference in condition or circumstances is opposed to the spirit of free government and is expressly prohibited by the constitution. (See *Marallis* v. *City of Chicago,* 349 Ill. 422.) It has been stated that "It is common * * * for certain classes of citizens, those engaged in a particular business, to appeal to the Government—National, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids a few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation ordinarily receives no encouragement at the hands of the courts, and will be upheld only where it is strictly within the legitimate power of the municipal legislature." (37 Am. Jur. 775-776.) The effect of the ordinance is to exempt from its requirements persons engaged in a competing business, different in no relevant respect from the business subject to the ordinance. This, as we have indicated, is an unreasonable discrimination.

In view of our conclusion as to plaintiff's first contention, it becomes unnecessary to consider their further objections that the ordinance is unreasonable in its terms and not sufficiently related to the preservation of public health, morals, safety, or welfare; that it constitutes an unlawful delegation of power to the board of health; and that the city lacks power to declare plaintiffs' business a nuisance. Our holding that the ordinance is void as an unlawful discrimination also disposes of defendant's contention that the circuit court erred in holding invalid section 95-29.8, requiring the keeping of detailed records.

In so far as the decree of the circuit court of Cook County overruled defendant's motion and granted an injunction, it is affirmed. In so far as it sustained defendant's motion as to other matters alleged in the complaint, the decree is reversed and the cause remanded, with directions to enter a decree for injunction as prayed.

Affirmed in part, and reversed in part, and remanded, with directions.

SECOND OPINION OF THE SUPREME COURT OF ILLINOIS.

[fol. 87] IN THE SUPREME COURT OF ILLINOIS

OPINION—Filed November 20, 1952

Docket No. 32185—Agenda 40— September, 1952

LEROY G. CHARLES, et al., Appellants,

v.

THE CITY OF CHICAGO, Appellee

Mr. Justice Bristow delivered the opinion of the court:

Plaintiffs, operators of a retail live-poultry business in Chicago, instituted proceedings to enjoin defendant from enforcing a municipal ordinance regulating the handling and slaughtering of live poultry in retail food establishments, on the ground that the ordinance is unconstitutional. The circuit court of Cook County held unconstitutional only certain provisions with reference to the keeping of records, but sustained the constitutionality of the remainder of the law, and dismissed plaintiffs' complaint for want of equity. The court signed a certificate of importance, and plaintiffs have appealed directly to this court on the ground that the cause involves the constitutionality of a municipal ordinance.

In determining whether the circuit court erred, the essential issue presented by this appeal is whether the ordinance effects an arbitrary classification by discriminating against retail live-poultry dealers in violation of the rights guaranteed by section 2 of article II and section 22 of article IV of the Illinois constitution, and the fifth and fourteenth amendments of the Federal constitution.

In their complaint to enjoin the enforcement of the ordinance, plaintiffs allege that the operations of killing, bleeding, plucking, drawing and eviscerating poultry, which it performs, are also performed by wholesale poultry dealers and to a great extent by many retail dressed-poultry dealers. Consequently, plaintiffs argue that the sanitation requirements of the ordinance, apparently designed in the interests of public health, should apply to all businesses which perform similar operations, and by omitting from its coverage the wholesale poultry dealers and the retail dressed-poultry dealers the ordinance arbitrarily discriminates against the retail live-poultry dealers.

Defendant, city of Chicago, in support of the constitutionality of the ordinance, urges first that it was enacted pursuant to proper legislative authorization in the Revised Cities and Villages Act, and that the ordinance reasonably regulates the retail live-poultry business to effectuate the statutory purpose of protecting the public health. Furthermore, defendant argues, the classification is not arbi- [fol. 88] trary or discriminatory, inasmuch as the public health is affected differently by the operations of the retail live-poultry dealers than it is by the operations of the wholesale live-poultry dealers or of the retail dressed-poultry dealers.

In adjudging the constitutionality of this ordinance we shall consider the provisions of the ordinance, the statutory authority for its enactment, the effect on public health of the operations of the business regulated as compared with similar operations performed by businesses not covered by the ordinance, and then ascertain whether the classification contained therein is arbitrary or discriminatory.

The ordinance inserts sections 95-29.1 to 95-29.8 into the Municipal Code of the city of Chicago, and amends sections 130-10 and 130--13 of the Code. It is declared unlawful for any person to sell at retail, or to slaughter for sale at retail any live poultry or live fowl without a license, and it is provided that no license shall be issued unless the premises in which the poultry is slaughtered meet certain specified requirements.

For killing and dressing poultry there must be a separate room with a floor of "cement, concrete or other approved water tight nonabsorbent material, so graded and drained as to discharge all liquid matter into properly trapped sewer or cesspool connected drains." The ceilings must be at least eight feet above the floor and must be "of a smooth, hard impervious material free from cervices, cracks, ledges or projections." The walls must be of some impervious material, and the junctions with the ceilings and floors shall be made with a six-inch sanitary cove base of glazed tile or brick.

The room must be provided with a "killing trough" of certain dimensions and of certain hard, smooth-surfaced material, and shall discharge over properly trapped and sewer-connected drains. Proper receptacles shall be provided for all refuse material, and equipment shall be of some impervious and readily cleanable material. Moreover, this room and all equipment therein shall be cleaned each day after the slaughtering for the day has been completed.

It is further provided that there shall be adequate ventilation, an adequate supply of running hot water under pres-

sure, that all doors and other openings shall be properly screened, that the toilet rooms shall not open directly into the preparation room, that the empty crates shall be disinfected and cleaned so that no odors or nuisances are [fol. 89] created by the storage of the crates, and that refuse must be removed daily.

This ordinance was enacted pursuant to certain provisions of the Revised Cities and Villages Act, (Ill. Rev. Stat. 1949, chap. 24,) whereby municipalities are authorized: "To fix the amount, terms and manner of issuing and revoking licenses" (par. 23-5;) "To define, prevent and abate nuisances" (par. 23-61;) "To regulate the sale of all beverages and food for human consumption; to locate and regulate the place where and the manner in which any beverage or food for human consumption is sold" (par. 23-63;) "To provide for and regulate the inspection of all food for human consumption" (par. 23-64;) "To do all acts and make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease" (par. 23-81;) "To prohibit any offensive or unwholesome business or establishment within the municipality" (par. 23-89;) "To compel the owner of any grocery, cellar, * * * or other unwholesome or nauseous house or place, to cleanse, abate or remove the same, and to regulate the location thereof" (par. 23-90;) "To pass all ordinances and make all rules and regulations proper or necessary, to carry into effect the powers granted to municipalities, with such fines or penalties as may be deemed proper" (par. 23-106.)

The controverted ordinance herein is designed to protect public health by imposing more stringent sanitation re-

quirements upon a business involving the sale of food for human consumption, and one which may also be offensive, and may be predicated upon any one of the several foregoing powers. However, this ordinance, though based upon proper statutory authority, and reasonably designed to protect the public health, cannot, under the rights guaranteed by the Illinois and Federal constitutions, effect an arbitrary discrimination against the class upon which it operates by omitting from its coverage persons and objects similarly situated. *Marallis* v. *City of Chicago*, 349 Ill. 422; *People* v. *Weiner*, 271 Ill. 74.

Statutory classifications can properly be sustained only where there are real differences between the classes, and where the selection of the particular class, as distinguished from others, is reasonably related to the evils to be remedied by the statute or ordinance. *Josma* v. *Western Steel Car and Foundry Co.*, 249 Ill. 508.

The classification made by the ordinance is between the [fol. 90] retail live-poultry dealers as the class regulated, and the wholesale live-poultry dealers and retail dressed-poultry dealers as the class outside the scope of the ordinance. Although it may be argued that since the ordinance is designed to protect public health, the sanitation requirements respecting the handling and slaughtering of live poultry and other fowl should apply to all businesses which perform similar operations, and not merely the retail live-poultry dealers, however, that rationale reflects an incomplete analysis of the manner and extent to which the public health is affected by the respective classes.

In the preamble of the controverted ordinance the justification for the classification is set forth. It is stated, in

substance, that the handling and slaughtering of live poultry and other fowl in retail food establishments requires that such poultry and fowl be delivered in crates and other receptacles, which are deposited upon the sidewalks of the city, and, when emptied, remain thereon for considerable periods of time; and also that the operations require that the poultry and fowl be opened, cleaned and plucked, whereby the refuse, blood and feathers remain for considerable periods of time, all of which creates a nuisance and attracts rats and other vermin, affecting health and causing other hazards.

The potential health hazards of this business, warranting special regulation, have been recognized by courts as well as by the municipal council. In *Roich* v. *Board of Commissioners,* 168 Atl. 165 (N. J.), where the court sustained an ordinance vesting in the municipality's health officier and board of commissioners discretion to license live-poultry markets, it was stated: "Live poultry markets are not favorably regarded by the health officer of Union City because of the stench and vermin incident thereto. * * * It seems that the board of commissioners may very well refuse to issue new permits for what they believe to be an unnecessary and an unsanitary business." In *King* v. *Davenport,* 98 Ill. 305, the court stated: "Unwholesome trades, slaughter-houses, operations offensive to the senses, * * * may all, says Chancellor Kent, be interdicted by law in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbor, and that private interests must be made a subservient to the general interest of the community."

It is common knowledge that the retail live-poultry busi- [fol. 91] ness, as suggested in the preamble of the ordinance, involves the shipment of live chickens and other fowl in crates into retail stores, and the killing, bleeding, disemboweling and eviscerating of such poultry, with its attendant stench, refuse, vast quantities of blood, waste matter from the live chickens, and noise. Moreover, the blood and entrails attract vermin and rats, and the refuse incidental to the plucking and cleaning, plus the empty filthy crates stored on the sidewalks, forms an ideal breeding place for such vermin and disease germs.

Inasmuch as these retail live-poultry stores are located in business districts (Municipal Code of Chicago, section 194A-10,) where people go for shopping and recreation, and are in close proximity to residential and apartment-house districts, the health hazards involved in the operations of this business affect great numbers of people in the conduct of their daily affairs.

In contrast, the operations of the retail dressed-poultry dealers, while located in the same area, involve, at most, evisceration of the poultry, and the refuse incidental thereto. The operations of these retail dressed-poultry dealers do not involve the shipment of live chickens in crates, with the attendant waste matter from the live poultry, vermin and stench; nor do they involve the killing, plucking and bleeding, with the extensive refuse and pools of blood, which attract rats and flies, nor the storing of dirty crates on the sidewalks. In is not merely the presence of a "few additional feathers" which distinguishes the classes, as suggested by plaintiff. In fact, it is difficult to perceive how the operations of the retail live-poultry dealers and

the retail dressed-poultry dealers can be classed together with respect to the public-health hazards they create; hence, it is in no way arbitrary to differentiate between these two classes and to regulate only the retail live-poultry dealers whose operations have a far more dangerous effect on public health.

With reference to the classification between the wholesale and retail-live poultry dealers, it is apparent that while their operations are identical in many respects, nevertheless, they are conducted in different proximity to the public. The court may properly take judicial notice of the zoning ordinance whereby wholesale live-poultry dealers may operate only in a manufacturing district. (Municipal Code of Chicago, section 194A-12(2).) Under these circumstances, the noxious operations of the wholesalers are not con-[fol. 92] ducted in an area which the public must traverse for its shopping or its recreation, or in close proximity to dwelling places, churches, hospitals, or other places where people congregate, as are the operations of the retail live-poultry dealers. Consequently, the dangers to the public health from the vermin, disease germs, rats, stench, and other nauseous elements incidental to the live-poultry business are not as great from the operations of the wholesale dealers as they are from the operations of the retail live-poultry dealers. Therefore, a legitimate basis for differentiation exists between these two classes, which warrants imposing the additional sanitation requirements upon only the retail live-poultry dealers.

On the basis of this analysis it is our judgment that the classification effected by the controverted ordinance is neither arbitrary nor discriminatory, and therefore, in no

way constitutes a denial of due process or equal protection of the laws, or of other rights guaranteed by the State and Federal constitutions. The decree of the circuit court sustaining the constitutionality of these regulatory and licensing provisions, and dismissing plaintiff's complaint to enjoin the enforcement of the ordinance, must therefore be affirmed.

Section 95-29.8 reads as follows: "Every licensee who purchases any live poultry or live fowl for resale or to be slaughtered for sale at retail, shall keep a record which will show the date of purchase, the number, weight, breed, description, and other distinguishing marks, if any, of said live poultry or live fowl and the name, address and brief description of the seller or sellers, type of conveyance used by said seller or sellers; and if said conveyance is a motor vehicle, a record of the license number thereof; which record shall be open to inspection by officers of the city at all times."

The chancellor held this section void. Appellants have not seen fit to defend this determination in their brief. There was no proof introduced on the hearing below indicating that the provisions of that section are in any way unreasonable. That section is designed for the purpose of aiding the municipal authorities to control the traffic in diseased and stolen poultry and fowl by being able to trace the source of supply. The presumption is in favor of the validity of an ordinance, and it will not bow to an attack because of unreasonableness unless the proof is clear and strong. (*Dorwari* v. *City of Jacksonville*, 333 Ill. 143, 148.) It was error for the trial court to strike down this provision. This action of the trial court is reversed. It is our conclusion that the ordinance is valid.

Affirmed in part, and reversed in part.

MAY 16 1
HAROLD B. WILL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 720

LE ROY G. CHARLES, JOHN L. CHARLES, MARY E. CHARLES, WOODROW CHARLES, DOCK CHARLES, EUGENE CHARLES, and GRADY JONES,

Petitioners,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

JOHN J. MORTIMER,
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CHAMPLIN-SHEALY COMPANY, CHICAGO 303

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CITY OF CHICAGO, a Municipal Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

The respondent, City of Chicago, a municipal corporation, opposes the petition for certiorari on the following grounds:

I.

The poultry ordinance properly and reasonably regulates the retail live poultry business for the protection of the health and welfare of the public and does not violate the Constitution of the United States.

The petitioners admit "that all phases of the poultry business in Illinois are subject to reasonable regulation by the respondent herein" (Petition for Writ of Certiorari,

p. 23) but seek to show that the Supreme Court of Illinois deprived them of constitutional rights when it held that the poultry ordinance "... is designed to protect public health by imposing more stringent sanitation requirements upon a business involving the sale of food for human consumption, and one which may also be offensive ..." (Petition for Writ of Certiorari, p. 59); *Charles* v. *City of Chicago,* 413 Ill. 428, 432.

This holding does not present a federal or constitutional question. It presents the judgment of the Supreme Court of Illinois that the regulations of the poultry ordinance are reasonable and designed to correct abuses inimical to the public health and welfare.

The petitioners are complaining, not of want of due process but of an alleged erroneous decision of the Supreme Court of Illinois in the course of the usual judicial process. The Federal Constitution offers no guarantee of correct decisions.

Ballard v. *Hunter,* 204 U. S. 241, 258.
Chicago L. Ins. Co. v. *Cherry,* 244 U. S. 25, 30.

The petitioners try to create the impression that the poultry ordinance excludes retail live poultry dealers from doing business in the City of Chicago. It does not do this. It merely provides the conditions that such a business must meet.

It is a matter of common knowledge, and such that judicial notice is taken thereof, that the retail live poultry business is an offensive, unwholesome business that is a nuisance and municipalities have the power to prohibit it entirely. (*Harmison* v. *City of Lewiston,* 153 Ill. 313.)

In fact, the preamble to the poultry ordinance clearly states the reason for its passage. It provides:

> "Whereas, the handling and slaughtering of live poultry and other fowl, in and about retail food establishments, requires that such poultry and fowl be de-

> livered in crates and other receptacles which are deposited upon the sidewalks of the City, and, when emptied, remain thereon for considerable periods of time; and whereas, the handling and slaughtering of live poultry and fowl, in and about retail food establishments, requires that such poultry and fowl be opened, cleaned and plucked, whereby the refuse, blood and feathers remain therein for considerable periods of time; and whereas, this creates a nuisance and attracts rats and other vermin, causing health and other hazards; therefore, for the purpose of protecting the health and welfare of the people of Chicago from such unclean and insanitary conditions, in and about retail food establishments: . . ."

The preamble could also have included the stench and noxious odors emanating from retail live poultry markets. This characteristic of retail live poultry markets was recognized in *Roich* v. *Board of Commissioners of Union City,* 168 A. 165 (Supreme Court of New Jersey). In that case an ordinance vested in the municipality's health officer and board of commissioners the discretion to license live poultry markets.

The plaintiff sought a writ of *mandamus* to compel the issuance of a license to operate a live poultry market. The court refused the writ and said (p. 165):

> "Live poultry markets are not favorably regarded by the health officer of Union City because of the stench and vermin incident thereto. It seems that the board of commissioners may very well refuse to issue new permits for what they believe to be an unnecessary and an unsanitary business."

In *Paterson* v. *Johnson,* 214 Ill. 481, the court held valid an ordinance of the City of Chicago regulating the construction or removal of wooden buildings within its corporate limits but outside the "fire limits". The court said (p. 488):

> "the city council—of a city—organized under that act (City and Village act) has the power to declare what

shall be considered nuisances and to abate and remove the same,—, and we think the power to regulate the construction or removal of wooden buildings anywhere within the corporate limits of such municipalities is clearly implied as incident to those powers, although such powers are conferred upon such municipalities only in general terms."

The court cited (p. 489) *King* v. *Davenport,* 98 Ill. 310, and quoted from said case (p. 489):

> "The inquiry then must be whether the enactment of such a law (declaring what shall constitute a nuisance) is within the competency of legislative power. Unwholesome trades, slaughter-houses, operations offensive to the senses,—may all, says Chancellor Kent, be interdicted by law in the midst of dense masses of population, on the general and rational principle that every person ought to so use his property as not to injure his neighbors, and that private interests must be subservient to the general interests of the community. (2 Kent's Com. 340.)"

The court also cited (p. 490) *Wadleigh* v. *Gilman,* 12 Me. 405, and quoted from said case (p. 490):

> "Police regulation may forbid such a use and such modification of private property as would prove injurious to the citizens generally. This is one of the benefits which we derive from associating in communities. It may sometimes occasion an inconvenience to an individual, but he has a compensation in participating in the general advantage. Laws of this character are unquestionably within the scope of the legislative power without impairing any constitutional provisions."

Instead of complaining about the poultry ordinance, which is designed to transform the retail live poultry business into one that will not be a public nuisance, the petitioners should be more than willing to comply with the provisions of the poultry ordinance, in order not to be legislated out of business.

The petitioners have gone to great lengths in their petition to show that the poultry ordinance is unconstitutional because it deprives them of property rights without due process of law. We submit that in the instant case, the subject matter,—retail live poultry markets,—without any doubt, falls within the police power, so that the cases cited by petitioners are not applicable.

The petitioners take the position that since they complied with the ordinances in effect at the time they went into the retail live poultry business, they cannot now be compelled by the present ordinance to do anything further to remain in business (Petition for Writ of Certiorari, p. 24). They admit their business is subject to regulation but they want to fix the regulations.

In *City of Chicago* v. *Arbuckle Bros.*, 344 Ill. 597, an ordinance of the City of Chicago providing for sanitary regulations and licensing of wholesale food establishments was held valid. The court said (p. 604):

> "If there is a reasonable connection between any business or occupation and danger to the public a reasonable ground for regulation is presented. Insanitary conditions in the production, keeping, handling and sale of food may result in unwholesome food and affect the health of the persons who purchase it. The probability of the existence of these conditions renders the business of the sale of food a proper one for municipal regulation, *and the city council is the judge of the expediency or regulation.* (*Ruban* v. *City of Chicago,* 330 Ill. 97.)" (Emphasis added.)

In *City of Chicago* v. *R. & X. Restaurant,* 369 Ill. 65, a restaurant ordinance was held valid that defined food dispensers, regulated the storage, handling and sale at retail of foods and drinks intended for human consumption; provided regulations as to dining rooms, kitchens, storerooms, pantries, refrigerators, plumbing, screens and employees; designated the manner of cleaning dishes, eating and drink-

ing vessels, silverware, kitchenware and utensils; provided for protection of foods from rats, mice, vermin, insects, flies and dust; required the wearing by employees of suitable, clean and washable clothing; provided for the disposition of refuse and garbage and the keeping of receptacles therefor; and practically covered the entire field of regulation of the business of selling to the public at retail foods and drinks for consumption on the premises.

A comparison of the restaurant ordinance with the poultry ordinance shows that they are, for all practical purposes, identical in their objectives. The poultry ordinance accomplishes for the protection of the public the same things that the restaurant ordinance does.

The provisions of the poultry ordinance relating to the type of material and mode of construction of the preparation or slaughtering room are objected to by petitioners on the grounds that compliance therewith will cost petitioners money and that the regulations of the former ordinance are adequate. Here the petitioners again assume to legislate for the city council.

We submit that every regulation in the poultry ordinance is reasonable and necessary for the public health and welfare. The most important police power of a municipality is that of caring for the safety and health of the community, and ordinances for that purpose should be liberally construed. (*Biffer* v. *City of Chicago*, 278 Ill. 562; *Williams* v. *City of Chicago*, 266 Ill. 267.)

A rightful exercise of the police power is not a violation of the fourteenth amendment even though property interests are affected. (*The People* v. *Weiner*, 271 Ill. 74, 78.)

II.

The fact that the poultry ordinance is limited to the retail live poultry business and does not regulate every phase of the poultry business does not make it arbitrary or discriminatory between businesses because such a limitation is proper and reasonable.

The petitioners seek to show that the poultry ordinance arbitrarily discriminates against them because it does not apply to dressed poultry dealers and wholesale poultry dealers.

The difference between a retail live poultry market and a retail dressed poultry market is so obvious as to need no explanation.

This difference was fully recognized by the Supreme Court of Illinois when it said (Petition for Writ of Certiorari, p. 61), *Charles* v. *City of Chicago,* 413 Ill. 428 (p. 434):

> "It is common knowledge that the retail live poultry business, as suggested in the preamble of the ordinance, involves the shipment of live chickens and other fowl in crates into retail stores, and the killing, bleeding, disemboweling and eviscerating of such poultry, with its attendant stench, refuse, vast quantities of blood, waste matter from the live chickens, and noise. Moreover, the blood and entrails attract vermin and rats, and the refuse incidental to the plucking and cleaning, plus the empty filthy crates stored on the sidewalks, forms an ideal breeding place for such vermin and disease germs. . . .
>
> "In contrast, the operations of the retail dressed-poultry dealers, while located in the same area, involve, at most, evisceration of the poultry, and the refuse incidental thereto. The operations of these retail dressed-poultry dealers do not involve the shipment of live chickens in crates, with the attendant waste matter from the live poultry, vermin and stench; nor do

> they involve the killing, plucking and bleeding, with the extensive refuse and pools of blood, which attract rats and flies, nor the storing of dirty crates on the sidewalks. It is not merely the presence of a 'few additional feathers' which distinguishes the classes, as suggested by plaintiff. In fact, it is difficult to perceive how the operations of the retail live-poultry dealers and the retail dressed-poultry dealers can be classed together with respect to the public health hazards they create; hence, it is in no way arbitrary to differentiate between these two classes and to regulate only the retail live-poultry dealers whose operations have a far more dangerous effect on public health."

The petitioners try to put themselves in the same classification as a wholesale poultry dealer by claiming that wholesale poultry dealers do the same acts they do, such as slaughter, bleed, remove the feathers, the heads and feet from, and eviscerate the poultry. The fact that wholesale poultry dealers do the same thing as the retail live poultry dealers does not put both in the same class for legislative purposes. They are different in that one is a wholesaler and one is a retailer. They are different in that under the zoning laws of the City of Chicago they are in different districts. A retail live poultry store is permissible in a business district (Municipal Code of Chicago, section 194A-10 [6], while "Poultry, game and small animal hatching, raising, breeding killing, packing and storage for wholesale distribution" are only permissible in a manufacturing district (Municipal Code of Chicago, section 194A-12 [2]) and obviously do not affect the public generally. In manufacturing districts, noise and odors are not as bothersome a nuisance as in a business district or one close to residences and living quarters, because of the very nature of a manufacturing district and the many industrial uses found there. But in places near where people live or collect in large numbers for health, recreation, education and worship, the filth and noisome odors

of slaughter, the rats attracted by the odor of blood, the vermin, lice and poultry droppings brought into the vicinity on the poultry and in the crates, creates a nuisance and a health hazard which justifies the classification, necessitates the regulation, and affords a compelling need for regulating the distance of slaughter of poultry from the specified places.

The legislature may, in the exercise of the police power, classify persons if the classification is based upon some reasonable distinction having reference to the object of the legislation. (*Josma* v. *Western Steel Car Co.*, 249 Ill. 508, 516.)

It is well settled that law-making bodies possess a broad discretion in making classifications for legislative purposes, and that the exercise of this power will not be judicially disturbed unless clearly unreasonable. (*People* v. *Callicott*, 322 Ill. 390, 392; *Biffer* v. *City of Chicago*, 278 Ill. 562, 573-575; *Casparis Stone Co.* v. *Industrial Board*, 278 Ill. 77, 80.)

In *Stearns* v. *City of Chicago*, 368 Ill. 112, the city council amended its public garage licensing ordinance and classified garages into Class I or housed garages, and Class II or open-air garages. The license fee prescribed for open-air garages was 400 per cent higher than that exacted from housed garages, and the ordinance was attacked as being unlawfully discriminatory against open-air garages and hence violative of the federal and state constitutions. The court upheld the constitutionality of the ordinance and said (p. 117):

> "Laws will not be regarded as special or class legislation merely because they affect one class and not another, provided they affect all members of the same class alike. (*People* v. *Sisk*, 297 Ill. 314 and *People* v. *Callicott*, 322 id. 390.) A classification will be sustained if it is reasonably adapted to secure the purpose

> for which it is intended and not purely arbitrary, and such a classification will not be disturbed by the courts, unless it can be clearly seen there is no fair reason for the distinction made."

In *Larson* v. *City of Rockford*, 371 Ill. 441, 446, it was held that the fact that the operation of automatic machines dispensing confectioneries was regulated by one ordinance and retail confectionery stores were regulated by another ordinance did not render the ordinance regulating the machines arbitrary or discriminatory.

In *Illinois Cigarette Service Co.* v. *City of Chicago*, C. C. A. Ill., 89 F. 2d 610, it was held that an ordinance prohibiting the use of automatic vending machines for the sale of cigarettes in order to prevent sales to minors was within the powers conferred on the City of Chicago and not unconstitutional as depriving manufacturers and lessors of such machines of their property without due process of law, or as unreasonably and arbitrarily discriminating between persons and businesses of the same general class and character. The court said (p. 612):

> "In *Grundling* v. *City of Chicago*, 176 Ill. 340, . . . the court said: 'When the city council considers some occupation or thing dangerous to the health of the community, and, in the exercise of its discretion, passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other.'"

The petitioners claim "that they who buy, slaughter and sell poultry to retail dealers may legally operate in a business district" (Petition for Writ of Certiorari, p. 26) and cite section 194A-11 of the Municipal Code of Chicago as authority. They did not make this contention below and are in error when they now make it.

Section 194A-11 pertains to commercial districts and not business districts and although it allows "any use permitted in a business district" it does not allow commercial uses in business districts.

We deny that the term "wholesale produce market" used in section 194A-11 allows a slaughter house in a commercial district. The definition of "produce" cited by petitioners from *State* v. *Hurst,* 41 P. (2d) 1079, 1081, fails to sustain their claim. In any event, wholesale slaughterers are not allowed in business districts.

The Supreme Court of Illinois recognized as valid the reason why the poultry ordinance differentiates between retail and wholesale live poultry dealers. It said (Petition for Writ of Certiorari, pp. 62-63); *Charles* v. *City of Chicago,* 413 Ill. 428 (p. 435):

> "With reference to the classification between the wholesale and retail-live poultry dealers, it is apparent that while their operations are identical in many respects, nevertheless, they are conducted in different proximity to the public. The court may properly take judicial notice of the zoning ordinance whereby wholesale live-poultry dealers may operate only in a manufacturing district. (Municipal Code of Chicago, section 194A-12 (2).) Under these circumstances, the noxious operations of the wholesalers are not conducted in an area which the public must traverse for its shopping or its recreation, or in close proximity to dwelling places, churches, hospitals, or other places where people congregate, as are the operations of the retail live-poultry dealers. Consequently, the dangers to the public health from the vermin, disease germs, rats, stench, and other nauseous elements incidental to the live-poultry business are not as great from the operations of the wholesale dealers as they are from the operations of the retail-live-poultry dealers. Therefore, a legitimate basis for differentiation exists between these two classes, which warrants imposing the additional sanitation requirements upon only the retail live-poultry dealers.

> "On the basis of this analysis it is our judgment that the classification effected by the controverted ordinance is neither arbitrary nor discriminatory, and therefore, in no way constitutes a denial of due process or equal protection of the laws, or of other rights guaranteed by the State and Federal constitutions."

In *Hadacheck* v. *Sebastian,* 239 U. S. 394, this court held valid an ordinance of the city of Los Angeles prohibiting the manufacturing of bricks within specified limits of the city. This court said (p. 413):

> "In his petition and argument something is made of the ordinance as fostering a monopoly and suppressing his competition with other bricklayers. The charge and argument are too illusive. It is part of the charge that the ordinance was directed against him. The charge, we have seen, was rejected by the Supreme Court, and we find nothing to justify it.
>
> "It may be that brick yards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful. And it may be, as said by the Supreme Court of the State, that the conditions justify a distinction. However, the inquiries thus suggested are outside of our province.
>
> ". . . we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does not exactly accommodate the conditions or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action."

In view of the foregoing, it is clear that petitioners' contentions of invalidity based upon the claim of unreasonable classification and lack of uniformity in operation are not sustainable.

The petitioners' exception to the fact that the Supreme Court of Illinois reversed part of the judgment not appealed from is not well taken. We submit that it does not present a question that comes within the purview of a petition for certiorari. The Supreme Court of Illinois properly took the view that it should decide the validity of every section of the poultry ordinance.

III.

There are no important questions of law or policy involved.

It is respectfully submitted that this case presents no important questions of federal law and that it is not in conflict with the decisions of this court or with those of any other federal court of appellate jurisdiction. There is no showing that this decision does more than help the City of Chicago to protect the public from the abuses of a business which has been held to be a nuisance.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, A. D. 1951.

No. [redacted]720

LEROY G. CHARLES, JOHN L. CHARLES, MARY E. CHARLES, WOODROW CHARLES, DOCK CHARLES, EUGENE CHARLES AND GRADY JONES,

Petitioners,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

REPLY BRIEF FOR PETITIONERS.

LEROY CHARLES,
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Chicago, Illinois.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1951.

No. 235

LEROY G. CHARLES, JOHN L. CHARLES, MARY E. CHARLES, WOODROW CHARLES, DOCK CHARLES, EUGENE CHARLES AND GRADY JONES,

Petitioners,

VS.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

REPLY BRIEF FOR PETITIONERS.

May it please the Court:

The respondent has refused to support the second decision of the Supreme Court of Illinois, which held that the obnoxious ordinance attacked, was not repugnant to the Federal Constitution (R. 44). The respondent brushed

the federal question aside by ignoring it. If the respondent ignores it, it does not exist and cannot be considered by this court. That is the position taken by the respondent in this case.

I

The second decision of the Supreme Court of Illinois upholding the ordinance under attack is contrary to the decisions of this court and deprived the petitioners of substantial property rights which are guaranteed to them by the 14th Amendment to the United States Constitution.

Hague v. *C. I. O.*, 307 U. S. 496, 530-31

Nor. Car. R. R. Co. v. *Zachary*, 232 U. S. 248, 257-59

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Allen v. *Smith*, 173 U. S. 389

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III

The second decision of the Supreme Court of Illinois on a part of the decree unrelated to the issues raised on the appeal, which part was a separate adjudication in equity, in violation of the positive rule and settled decisions of that court, deprived the petitioners of a review by the established and settled law, procedural and substantive and denied them due process of law and equal protection of the law.

Conant v. *Lansden,* 409 Ill. 149, 152-3

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(a) Theft is a crime and a municipality cannot punish crime and cannot make investigations, which are not to aid the city council in legislation.

Kilbourn v. *Thompson,* 103 U. S. 168, 190

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I

The second decision of the Supreme Court of Illinois upholding the ordinance under attack is contrary to the decisions of this court and deprived the petitioners of substantial property rights which are guaranteed to them by the 14th Amendment of the United States Constitution.

On page 2 of its brief, the respondent said that no Federal question was involved herein. The petitioners asserted that they were denied equal protection of the laws of the United States (R. 11); that the ordinance violated the 5th and 14th Amendments to the Constitution of the United States and deprived them of their property without due process of law (R. 12-13). The second decision of the Supreme Court of Illinois held that the rights of petitions guaranteed by the Federal Constitution were not violated by the ordinance under attack (R. 44). In the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 544-5, this court said when it is claimed that a state enactment is invalid under the United States Constitution and that claim is sustained or rejected, this court will review the judgment at the instance of the unsuccessful party.

In the case of *Hague* v. *C. I. O.*, 307 U. S. 496, 530-31, this court said, when suit is brought to restrain the enforcement of a statute, which is an infringement of the equal protection clause of the 14th Amendment, a Federal question is involved.

In the case of *Nor. Car. R. R. Co.* v. *Zachary,* 232 U. S. 257-59, the North Carolina Supreme Court held that a certain Federal act did not apply. This court held that plaintiff was entitled to the benefit of the asserted Federal right and reversed the case.

On pages 2 and 3 of its brief, the respondent quoted the preamble of the ordinance as authority. This matter is answered on pages 38 and 39 of our Petition for Certiorari. But we add that everything mentioned in the preamble as creating a nuisance, except the feathers, is found in every retail dressed poulterers establishment next door to that of the retail live poulterer. In the case of *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 290, this court said that the preamble is not legislation, but is a recital of the considerations, which in the opinion of the legislative body justified the legislation. However, the preamble in the case at bar is important because it makes clear the pure assumption by the City Council that the same refuse, entrails and blood, which create a nuisance in a retail live poultry establishment create only wholesome and sanitary conditions in a retail dressed poultry establishment.

The admitted facts clearly establish that retail dressed poulterers clean, pluck and eviscerate poultry and cause refuse, entrails and blood to remain in their establishments (R. 9-10). The only refuse, which is not in retail dressed poulterers' stores and is found in retail live poulterers' stores, is feathers. The amount of blood depends upon the amount of business done.

There was no discrimination in the case of *Roich* v. *Board of Com'rs. of Union City,* 168 Atl. 165, cited by the Illinois Supreme Court (R. 45), and by the respondent on page 3 of its brief. In that case the health officer denied

all applications for licenses for that particular building. However, so long as we have a government of law and not of men, the likes and dislikes of a health officer cannot override our Federal Constitution and deprive thrifty citizens of their inalienable rights under that constitution.

The cases of *Paterson* v. *Johnson*, 214 Ill. 481 and *Wadleight* v. *Gilman*, 12 Me. 405, cited on pages 3 and 4 of respondent's brief, deal only with the power of a city to forbid any use of dangerous and unsafe buildings. These cases do not deal with arbitrary discrimination in any form.

II

The second decision of the Supreme Court of Illinois upheld arbitrary suppression of legitimate and harmless businesses and the arbitrary discrimination against retail live poulterers in violation of the 14th Amendment to the Constitution of the United States.

We wish to make it clear that we have never objected to the provisions of the ordinance affecting the handling, cleaning and storing of crates.

On page 10 of its brief, respondent said that we never contended below that wholesale poulterers are permitted to operate in business districts in Chicago. We argued this question generally in point one of our brief filed in the Supreme Court of Illinois. But we quoted both ordinances on pages 10 and 11 of our answer to the brief of the amicus curiae, which answer is a part of the record filed herein. We copied sections 194A-11 and 194A-12 from said answer into our Petition for Certiorari filed herein on pages 10 and 11.

We contend that the term "wholesale produce market," found in section 194A-11 of the City Code (Petition for Certiorari page 26) was used in its ordinary and comprehensive economic sense, and that the term includes wholesale poultry markets. In the case of *Walling* v. *De Soto Creamery and Produce Co.*, 51 F. Supp. 938, 940-43, the court found as a fact that the produce company's employees, who were engaged in buying, handling, feeding, slaughtering and picking poultry were paid less than the minimum wages.

On page 4 of its brief, the respondent cited the case of *King* v. *Davenport*, 98 Ill. 310, dealing with slaughter-houses and unwholesome trades. We are dealing here with food markets and not slaughter-houses or trades. In the case of *Bird* v. *Grout*, 94 N. Y. S., 127, 128, market lands could be conveyed or leased only for market purposes. The court enjoined the leasing of a part of the market land for a slaughter-house, because the lease was not for a market purpose.

The Illinois Supreme Court apparently misread or misunderstood section 194A-12 (2) of the Municipal Code of Chicago, of which it took judicial notice (R. 47). That court said under that ordinance, wholesale live poultry dealers may operate only in a manufacturing district. We are dealing here with wholesale and retail live poultry markets in the City of Chicago. Section 194A-12 (2) of the ordinance relied upon by the court confines to manufacturing districts only those, who raise, breed, hatch, kill, pack and store small animals and poultry for wholesale distribution (Petition for Certiorari page 26). The word market is not used anywhere in section 194A-12 (2) of that ordinance. It is clear from the very language of that ordinance that it deals with and is applicable only to

manufacturers and producers. In the case of *Charles March and Co.* v. *Higgins*, 36 F. Suppl. 792, 795, the court said:

> "Manufacture implies a change but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary as set forth and illustrated in *Hartranft* v. *Wiegmann*, 121 U. S. 609, 7 S. Ct. 1240, 30 L. Ed. 1012. There must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use.'" (Emphasis by the court).
>
> In *Allen* v. *Smith*, 173 U. S. 389, 19 S. Ct. 446, 43, L. Ed. 741, the Supreme Court held that under the particular statute before it there was no legal distinction between "manufacturer" and "producer." I see no compelling reason for placing a different construction on the terms in the instant case.

In the case of *New Orleans* v. *Morris*, 18 Fed. Cases 111, 113, the court said:

> "Although a market may not be a locus publicus in the sense that the ownership of the soil is necessarily vested in the public, still it is a public place in this sense. It is a place to which all persons have a right to resort daily to supply themselves with such provisions and necessaries as are there vended."

On the same page the court further said:

> "The method was that of a market, the matter entirely distinct. But the whole power of the city over markets springs from the fact that vegetables and meats liable to decay and putrefy are therein sold daily in large quantities; these being excluded from the place, it loses the essential quality of a market as it is defined in our jurisprudence."

In the case of *Roland Co.* v. *Walling,* 326 U. S. 657, 674, this court said:

> "Wholesaling includes all marketing transactions in which the purchaser is actuated solely by a profit or business motive in making the purchase. Retailing includes all marketing transactions in which the purchaser is actuated solely by a desire to satisfy his own personal wants or those of his family or friends through the personal use of the commodity or service purchased. (Beckman and Engle in Wholesaling Principles and Practice (1937) p. 25)."

Section 194A-11 (2) of the zoning ordinance, which was quoted and discussed, but ignored by the Supreme Court of Illinois, provides that, "a wholesale produce market," is permitted in business districts in Chicago (Petition for Certiorari page 26). The zoning ordinance relied upon by the Illinois Supreme Court is wholly unrelated to markets and marketing. It is wholly inapplicable to any issue in the case at bar. We concur in the statement made by respondent on page 11 of its brief, that the term, "wholesale produce market" used in section 194A-11 of the ordinance, does not allow a slaughter house in a commercial district. But, we again remind respondent that a slaughter house is not a market and has no market purpose. *Bird* v. *Grout,* 94 N. Y. S. 127, 128. Section 194A-11 deals with markets and section 194A-12 (2) deals with and applies to manufacturers, producers and slaughter houses, and confines them to manufacturing districts.

We quote from the brief of the real party in interest in this cause, the wholesale poulterers in Chicago, who call themselves Amicus Curiae, page 10:

> "Plaintiff and all other persons can purchase at either wholesale or retail, poultry which is already slaughtered and the feathers removed and can buy poultry which is drawn and not be restricted or affected by the ordinance. The question as to whether

the handling of poultry—*in which the entrails have not been removed—produces filth and unsanitary conditions in one of fact.*"

"It is common knowledge that live poultry comes into Chicago from other areas and from other states, and is brought to the wholesaler from the farms. These wholesalers are engaged in interstate commerce."

Page 11 of the same brief:

"These wholesalers engaged in the poultry business have the live poultry brought to them. The live poultry is delivered in coops to the retail stores. These coops are taken into the retail stores."

This shows conclusively that the wholesale poulterers are not subject to or operating under Section 194A-12 (2) of the ordinance relied upon by the Illinois Supreme Court.

We refer this court to point IV, pages 39-43 of our Petition for Certiorari for further discussion of the Illinois Supreme Court's construction of the ordinance under attack. The City council intended that said ordinance and its prohibitions be effective as an entirety throughout the City of Chicago. The Illinois Supreme Court mutilated or amended the ordinance by construction and made it a fractional part of what the council intended, and made its validity dependent upon a wholly unrelated zoning ordinance. If the zoning ordinance is amended or repealed, what will be the status of the ordinance under attack?

III

The second decision of the Supreme Court of Illinois on a part of the decree unrelated to the issues raised

on the appeal, which part was a separate adjudication in equity, in violation of the positive rule and settled decisions of that court, deprived the petitioners of a review by the established and settled law, procedural and substantive and denied them due process of law and equal protection of the law.

On pages 29 to 33 of our Petition for Certiorari, we discussed the departure of the Supreme Court of Illinois from both procedural and substantive law to consider and reverse that part of the decree, which was a separate adjudication in equity and not involved in the appeal. On page 13 of its brief, the respondent feebly defended the court's action. The notice of appeal limited the appeal to the portions of the adjudications of the decree adverse to petitioners. The adjudication invalidating section 95-29.8 of Chapter 95 of the Code, etc. was specifically excepted from the appeal (R. 28-29). No cross-appeal was filed by respondent. On pages 29 and 30 of our Petition for Certiorari, we cited *Heine* v. *Degen*, 362 Ill. 359, 380, which quoted Rule 35 (1) of the Illinois Supreme Court showing that such action by that court could not legally be taken. In the case of *Conant* v. *Landsden*, 409 Ill. 149, 152-3, the court said:

> "It is true, as plaintiffs insist, that a cross appeal was taken in this case to the Appellate Court. But the questions presented remain separate and independent, and the rule referred to applies to further review by this court as well as to the initial review by the Appellate Court. Defendent's appeal brings nothing to this court except the decision of the Appellate Court concerning the surcharges and other matters to which his assignments of error are directed. While an appellee may assign cross errors on matters brought before this court by an appellant,

> cross errors cannot be assigned as to separate parts of a decree not brought before the court by appeal, even though the entire case was passed upon by the Appellate Court. (*Walker* v. *Montgomery,* 236 Ill. 244). The motion of defendant is, therefore, granted, except as to cross error No. 5, and the other cross errors will not be considered."

(a) Theft is a crime and a municipality cannot punish crime and cannot make investigations, which are not to aid the city council in legislation.

The respondent said on page 13 of its brief that the adjudication of the Supreme Court of Illinois cannot be reviewed by this court, but did not say why. The second decision of the Supreme Court of Illinois not only denied petitioners due process of law and equal protection of the law (Petition for Certiorari, pages 29 to 33), but sanctioned that, which is definitely erroneous. The Illinois court said the petitioners should have introduced evidence to prove the admitted facts (R. 48). This holding denied petitioners due process of law and equal protection of the law. (Petition for Certiorari pages 28 to 33).

The Illinois court said in its second decision that this section was designed to enable the municipal authorities to control the traffic in stolen and diseased poultry (R. 48). This is wholly inconsistent with the preamble of the ordinance (R. 17-18), which does not mention either diseased or stolen poultry. The preamble states the reasons for enacting the ordinance. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 290.

Furthermore, the City council cannot legislate to define and punish crime and therefore cannot authorize the investigation of crime. In the case of *Kilbourn* v. *Thompson*, 103 U. S. 168, 195, this court said that the House of

Representatives could not investigate any matter, if the investigation could not result in valid legislation on the subject to which the inquiry referred.

In the case of *United States* v. *Owlett*, 15 F. Supp. 736, the court held that the investigatory power of a legislative body is limited to obtained information on matters that fall within its proper field of legislative action. The same statement is found in 9 A. L. R., at page 1341.

In the case of *In re Ellis*, 28 N. Y. S. (2d) 988, the court said:

> "The power of the Legislatures to make investigations is limited to such investigations as are in fact auxiliary to and in aid of the legislative function, and does not extend to general investigations into private affairs."

In the case of *People* v. *Burnett*, 394 Ill. 420, 425, the Court said:

> "The legislature has authority to define what acts shall constitute a crime. In the exercise of the sovereign power of the State, it may fix the punishment to be imposed for the commission of the crime and in doing so the only constitutional limitation on its authority is that "all penalties shall be proportioned to the nature of the offense."

In the case of *State ex rel. Keefe* v. *Schmiege*, 28 N. W. 2d 345 at 346. (Supreme Court of Wisconsin 1947) the court said:

> "The legislature has power to vest in a county board or municipal council power to provide for good order of community by enacting ordinances regulating local affairs, provided there is not included the power in either to create crimes and impose criminal punishment."

In 36 Georgetown Law Journal (Vol. 36) p. 433, it is stated:

> "(1) only the sovereign can create a crime; (2) a county or municipality is not a sovereign; (3) a county or municipality cannot create a crime."

In the case of *Winchester* v. *Redmond,* 93 Va. 711, 715-16, the court said:

> "Crime is an offense against the State, and not against the city, town, or county in which it may be committed, as distinguished from the rest of the State. The offense is against the sovereign authority, and not against the individual or particular community. All the people of the State are concerned in the punishment and suppression of crime. And the State, whose prerogative it is to punish crime, has made adequate provisions for the vindication of the public justice. When a crime has been committed, it is her law, and not that of the corporation, that is broken. She has prescribed penalties for the various species of crime, and enacted laws for the arrest, trial, and punishment of criminals. They are arrested by her officers, and tried by her judiciary under her laws. The State constantly makes use of officers of the corporation in the discharge of its governmental functions, and requires them to perform, within the corporate limits, duties not strictly or properly local or muncipal in their nature. In the performance of such duties, they exercise State powers, and are in that respect State officers. As was said by Judge Staples in *Burch* v. *Hardwick,* 30 Gratt. 24, 34."

We wish to supplement what we said on pages 29 to 33 of our Petition for Certiorari as further answer to respondent. The ordinance does not require either farmers or wholesalers, who sell live poultry to retailers to give any information concerning or certify to the number, breed, description or distinguishing marks of the poultry

(R. 27). If a thief sold stolen poultry, or if a crook sold diseased poultry to a retailer, he would deny any record of the breed, number, distinguishing marks and description made by the retailer. The thief or crook never would admit that he sold any of the proscribed poultry. This would be the situation of the retail live poulterer under the unwarranted assumption of the Supreme Court of Illinois in its second decision to the effect that the traffic in diseased and stolen poultry is confined to retail live poultry dealers.

Section 95-29.8 of the obnoxious ordinance, insofar as retail live poultry dealers are concerned, provide in the minutest detail a comprehensive and exhaustive system of book-keeping concerning all poultry bought by them and all vehicles delivering poultry to them and all persons, who sell poultry to them (R. 27). The provision is wholly inapplicable to retail poulterers, because they buy in small quantities and are definitely established in a certain community and maintain a personal and close relationship with their customers. Any unfair or fraudulent practices on the part of the retailer would be readily discovered. This provision should appropriately apply to wholesale dealers, who buy in large quantities by wire and telephone and often re-consign the poultry before it is delivered to them. Therefore open accounts are necessary and the opportunity for fraud is evident.

Wherefore, the plaintiffs, the petitioners, respectfully pray that a writ of certiorari issue to the Supreme Court of Illinois, and that the second decision of that court, rendered in this cause, be reversed and held for nought.

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